NO. COA03-1524

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA,
Plaintiff

v. Alamance County
No. 02 CRS 55447

SHEILA DIANA ANDERSON,
Defendant

Appeal by defendant from judgment entered by Judge Steve A. Balog in Alamance County Superior Court. Heard in the Court of Appeals 2 September 2004.

*Attorney General Roy Cooper, by Special Deputy Attorney General Teresa H. Pell, for the State.*

*Teeter Law Firm, by Kelly Scott Lee, for defendant-appellant.*

CALABRIA, Judge.

Sheila Diana Anderson ("defendant") appeals from judgment entered on a jury verdict finding her guilty of second-degree murder. We find no error.

Prior to 13 June 2002, defendant and Harold Trollinger (the "victim") had known each other for approximately four years. During that time, defendant and the victim became intimate, and the victim asked defendant to move into his home. Thereafter, Nicole Ector ("Ector"), the daughter of the victim, also moved into the home. On the evening of 12 June 2002 all three residents were at

home: the victim had gone to bed; defendant remained awake, watching television and drinking; and Ector was using the telephone upstairs in her bedroom. Defendant informed Ector she needed to use the telephone. When Ector brought it downstairs, defendant discovered the telephone's battery was low, and it could not be used. An argument between defendant and Ector ensued, ending only after Ector returned upstairs to her room.

At some point around 2 a.m., defendant decided to go to bed and went into the bedroom she and the victim shared. Defendant asked the victim to talk to Ector about her actions. During the ensuing argument, the victim demanded that defendant leave, but defendant refused, insisting it was her bedroom as well as his. At that point, the victim got out of bed and said, "Well, we'll see about that." Defendant testified she became scared, that a vision of a handgun came into her mind, she went to the basement and procured a gun, and went outside to her car to leave. When defendant discovered she had forgotten her keys, she re-entered the home to retrieve them. Defendant testified she intended to return the gun, but the victim grabbed the gun and pointed it at her. Defendant testified that while she and the victim were "shuffling back and forth . . . the gun went off." During cross-examination, the State questioned defendant about certain inconsistencies between her testimony at trial and her statement to the police immediately after the shooting occurred.

Ector testified that, after she gave defendant the phone, she went upstairs until her friend Jonathan Jackson ("Jackson")

arrived, at which point she went outside and sat in his car. Thereafter, defendant came outside and asked what was wrong with the phone, and Ector informed her she had not had any problems with it. Defendant then went back inside, and Ector could hear defendant cursing and beating the phone inside the house for about fifteen minutes. Jackson similarly testified that he could hear defendant cursing and slamming cabinet doors, and when he left around 1:20 a.m., defendant was "on a melt down." Ector returned inside, and defendant began questioning her about why there was static on the television screen. Although defendant continued yelling, Ector went up to her room. Ector later came downstairs and observed defendant was still angry about the telephone and the television. The victim asked Ector what was happening, but Ector replied that she "didn't know" and "didn't want to have anything to do with it," and she returned to her room. Thereafter, Ector heard the gunshot.

The Grand Jury of Alamance County indicted defendant on the charge of first-degree murder on 1 July 2002. The case went to trial on 19 May 2003. The trial court denied defendant's motions to dismiss, made both at the close of the State's evidence and at the close of all the evidence. The jury found defendant guilty of second-degree murder, and the trial court sentenced defendant as a prior record level II offender in the presumptive range to 170 to 213 months' in the North Carolina Department of Correction. Defendant appeals.

I. Motion to Dismiss

Defendant assigns as error the trial court's denial of her motion to dismiss both at the close of the State's evidence and at the close of all of the evidence. Specifically, defendant contends the State did not present sufficient evidence of malice. We disagree.

We only consider defendant's argument that the trial court erred in denying defendant's motion to dismiss at the close of all the evidence because, by presenting evidence, defendant waived her right to appeal the denial of her motion to dismiss at the close of the State's evidence. *See State v. Laws*, 345 N.C. 585, 592, 481 S.E.2d 641, 644 (1997). "In reviewing the trial court's denial of defendant's motion to dismiss, this Court must look to see whether 'the trial court . . . consider[ed] the evidence in the light most favorable to the State, [having] giv[en] the State the benefit of every reasonable inference which may be drawn.'" *State v. Brooks*, 138 N.C. App. 185, 188, 530 S.E.2d 849, 852 (2000) (quoting *State v. Jarrell*, 133 N.C. App. 264, 267, 515 S.E.2d 247, 250 (1999)). "When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and internal quotation marks omitted). "'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider

necessary to support a particular conclusion[.]" *Id.* (citations omitted).

"Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Gainey*, 355 N.C. 73, 91, 558 S.E.2d 463, 475-76 (2002).

> Malice means not only hatred, ill will, or spite, as it is ordinarily understood . . . but [it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in his death, without just cause, excuse or justification] [malice also arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief].

*State v. Bostic*, 121 N.C. App. 90, 99, 465 S.E.2d 20, 25 (1995) (citation omitted) (alterations in original). Additionally, "malice may be inferred from the intentional use of a deadly weapon." *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994).

The theories of what occurred on the night of the shooting differ strikingly between that of the State and defendant. Defendant asserts she was upset, but not angry, with Nicole; and that when she mentioned Nicole to the victim, he got angry and scared her. She thought of and retrieved a gun from the basement and left the house. Upon reaching her car, she discovered she did not have the keys, so she returned to the house and, looking into the kitchen, saw the victim and informed him she did not know why

she retrieved the gun but she was going to put it away and only wanted to get her keys so she could leave. Thereafter, at some point, the victim grabbed the gun with his hands and, during the ensuing struggle, the gun went off and caused the fatal wound.

The State's evidence, however, tends to show that the defendant had been drinking and was angry about the phone battery being dead, the television producing a picture with static, and her perceived belief that the victim felt that Ector could do no wrong despite the fact that she blamed Ector for both malfunctions. The victim and defendant had a verbal argument about Ector, and when the victim intimated he was going to force defendant to leave, defendant told the victim that she "ain't fixin' to go no damn where." She also told the victim, "[D]on't think you threatening me 'cause he thought he had the gun hid . . . I know where it was . . . ." Defendant further told the victim, "[D]on't think I'm that stupid . . . you think I just walk around here in a damn daze or something[?]" Moreover, while defendant testified she left the house only to return for her keys, her statement to the police directly after the shooting does not indicate she ever left the house to go to her car or that she had to return because she did not have her keys. Finally, with regards to whether there was a struggle for the gun after defendant retrieved it from the basement, the State presented evidence from Tim Luper, a special agent with the State Bureau of Investigation in the trace evidence section specializing in the area of gunshot residue, that there was no gunshot residue on the victim's right palm, right back, or left

back portions of his hand, but there was residue on his left palm, which would be consistent with placing his hand over the wound. Moreover, he affirmed that he would expect to find gunshot residue on the back of the hand from a close range shot and explained that, generally, when a gun is fired, "the gunshot residue plume is centered around the firearm. . . . The gunshot residue will emanate from just about the weapon in general; and since the backs of the hands are exposed to that GSR plume, that's where we expect the [heaviest] concentrations . . . ." Expert testimony also revealed that the gun was functioning properly and would not fire without the trigger being pulled. This evidence is sufficient to contradict defendant's assertions that (1) a struggle for the gun occurred and (2) the struggle caused the gun to discharge accidently and is sufficient to support the conclusion that defendant acted with malice. Accordingly, the trial court properly denied defendant's motion to dismiss, and this assignment of error is overruled.

II. Removal of a Juror for Cause

Defendant next argues that the trial court abused its discretion in failing to remove Juror Hornaday ("Ms. Hornaday") for cause because of her relationship with the victim's son. Defendant challenged Ms. Hornaday for cause, which the trial court denied. At the time defendant sought to remove Ms. Hornaday, defendant had already used all of her peremptory challenges and requested an additional one. The trial court denied defendant's request. After the verdict had been returned, defendant made a motion for mistrial

based on the trial court's failure to remove Ms. Hornaday, which was also denied.

The record before us does not contain a transcript of the jury *voir dire*: "[a]s a rule of practice, when challenging the jury's composition, the burden is on the defendant to provide a transcript of the jury *voir dire* as well as any other relevant portions of the record." *State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412 (1989). *See also Jackson v. Housing Authority of High Point*, 321 N.C. 584, 364 S.E.2d 416 (1988) (observing that the failure to provide relevant portions of transcript may prevent review of alleged impropriety in jury selection). As defendant has failed to present that portion of the transcript setting out the process of jury selection, we are unable to undertake any meaningful review, and this assignment of error is overruled.

We note in passing that a review of defendant's arguments on the merits would be unavailing as well. "The trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment,to determine whether a juror can be fair and impartial." *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997). The transcript reveals the trial judge was "satisfied with [Ms. Hornaday's] answers that, although it's an emotional situation, that she will be able to follow the Court's instructions and decide this case based on the evidence presented. . . . ." Defendant's own summary of Ms. Hornaday's questioning shows she affirmed she could be fair and her ability to be impartial was not impaired as a result of any connection with the

victim. Finally, defendant candidly admits in her brief on appeal that "there is no evidence in the record to show that Mrs. Hornaday acted in a manner that was detrimental to [defendant's] case." No abuse of discretion is indicated.

III. Jury Instruction on Voluntary Manslaughter

Defendant next assigns as error the trial court's failure to give a jury instruction on voluntary manslaughter. Because defendant did not request an instruction on voluntary manslaughter at trial, she has failed to properly preserve this assignment of error for appellate review and is barred by N.C. R. App. P. 10(b)(2) (2004) from raising it. *State v. Penland*, 343 N.C. 634, 651, 472 S.E.2d 734, 743 (1996). Nonetheless, where a defendant fails to request a jury instruction, the trial court's failure to give the instruction may be reviewed for plain error "where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2004). However, by failing to allege plain error, defendant has waived it, and we do not reach the merits of this argument. *See State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994) (holding the same).

IV. Denial of Jury's Request to Take Written Notes

Defendant assigns as error the trial court's refusal to allow the jury to take written notes of the proceedings. During the trial, the jury requested that it be allowed to take notes after fourteen State witnesses had testified. The trial judge addressed the jury and said:

> I would tell you that had the inquiry been made at the beginning of the trial, you probably would have been allowed to. But since it comes at this stage, I think it would be appropriate in my discretion not to allow you to do so. So you'll be required to remember the evidence as we proceed through the trial and then to your deliberations.

Defendant, citing *State v. McNeil*, 46 N.C. App. 533, 536, 265 S.E.2d 416, 418 (1980), correctly concedes that our Courts "ha[ve] long recognized the authority of the trial judge to control the action of the jury with respect to taking notes." We hold accordingly.

No error.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).