NO. COA03-769

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2004

STATE OF NORTH CAROLINA

v. Wake County
No. 02 CRS 74191

BERNARD ROGERS,
Defendant.

Appeal by defendant from judgment entered 26 February 2003 by Judge James C. Spencer, Jr. in the Superior Court in Wake County. Heard in the Court of Appeals 25 August 2004.

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

Terry W. Alford, for defendant-appellant.

HUDSON, Judge.

Upon the jury's guilty verdict on the charge of first-degree murder, the trial court sentenced defendant to life imprisonment without parole. Defendant gave timely notice of appeal.

The State's evidence tended to show that on the morning of 24 August 2002, defendant knocked on Corrine Davis's front door at 5915 Dixon Drive in Raleigh, North Carolina, demanding to speak with Erika Lucas. Although Lucas was trying to end her romantic relationship with defendant, they had spent the previous night together at defendant's mother's house. When told Lucas was

asleep, defendant went across the street to his mother's house and tried to reach Lucas by telephone. Getting no answer, defendant returned to 5915 Dixon Drive, threw a cinder block through the sliding glass back door, and walked inside. Davis heard a loud crash and saw defendant coming up the stairs toward her bedroom. Defendant proceeded upstairs, where he kicked open the bathroom door and confronted Lucas. Lucas saw a silver gun in defendant's hand. Lucas' friend, Kebba Janneh, came into the hallway and told defendant that nothing was going on. Defendant struck Janneh with the gun. The two men struggled, falling into the shower. Janneh stood up and began to walk out of the bathroom. Defendant fired two shots at Janneh, the second of which struck him fatally in the chest. Defendant testified that when he pushed Janneh backward toward the stairs, Janneh slipped and grabbed defendant's hand, discharging the gun. Defendant then walked past Janneh's body and left Davis' home.

After the shooting, defendant mailed a letter to a friend, stating, "I thought old boy my girl was f------ so you know, I flipped and had to retal[iate]. I popped the n----- because you know me and Erika was f------ around. . . . Don't worry about me, though, they have no case, no burner, just them b-----s and I doubt if they show up for court." Defendant explained at trial that "burner" meant "gun."

Defendant first claims that the short form indictment filed by the State was insufficient to support his conviction for first degree murder, in light of the United States Supreme Court's

holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). We disagree. Our Supreme Court has held that "indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions. . . . Nothing in *Apprendi* . . . alters this prior case law." *State v. Braxton*, 352 N.C. 158, 174-75, 531 S.E.2d 428, 437-38 (2000), *cert. denied*, *Braxton v. North Carolina*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001) (internal citations omitted). Accordingly, we must overrule this assignment of error.

Next, defendant contends the trial court erred in denying his motion to dismiss the charge of first-degree murder. A motion to dismiss is properly denied when the evidence, viewed in the light most favorable to the prosecution, would allow a reasonable juror to find the defendant guilty of the essential elements of the charged offense beyond a reasonable doubt. *See, e.g.*, *State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619-20 (1988). The essential elements of first-degree murder are:

> First-degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation. The element of premeditation requires the state to show that the accused formed the specific intent to kill at some time, however brief, before the killing took place. Deliberation is the intention to kill, and it must be formed not in the heat of passion, but while defendant is in a cool state of blood.

State v. Nicholson, 355 N.C. 1, 37, 558 S.E.2d 109, 134, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71, *cert. denied, Nicholson v. North Carolina*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (citations and internal quotation marks omitted). Defendant contends that he

acted in the heat of passion, not with deliberation, and thus was guilty of no more than second-degree murder.

"Premeditation and deliberation are mental processes and ordinarily are not susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Laws*, 345 N.C. 585, 593-94, 481 S.E.2d 641, 645 (1997). Here, the evidence showed that defendant went across the street to obtain a loaded gun before breaking into Davis' house to confront Lucas and her suspected paramour. Moreover, defendant fired twice at Janneh as Janneh attempted to flee. Finally, after shooting Janneh, defendant did not continue arguing with Lucas, but walked past Janneh's fallen body and left the house. Viewing this evidence in the light most favorable to the State, a jury could reasonably infer that defendant acted deliberately in arming himself with the gun, that when he retrieved the gun from his mother's house he intended to use it, that he intentionally shot a retreating Janneh, and that he left Davis' house having accomplished his pre-meditated purpose. We overrule this assignment of error.

Turning to the trial court's charge to the jury, defendant argues that the trial court erred in refusing to give an instruction on the lesser included offense of voluntary manslaughter. "[A] trial court does not commit prejudicial error in failing to give a voluntary manslaughter instruction when a jury rejects a verdict of guilty of second-degree murder and instead finds defendant guilty of first-degree murder." *State v. Lyons*,

340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995). Here, as in *Lyons*, the court instructed the jury on first-degree murder and second-degree murder. The jury found defendant guilty of first-degree murder. "[W]hen a jury does not find that defendant was in the grip of sufficient passion to reduce the murder from first-degree to second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter." *Id.* at 664, 459 S.E.2d at 779 (internal quotation marks omitted).

Defendant also faults the trial court for failing to instruct the jury on the defense of accident. "[E]vidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when the killing occurred." *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731-32 (1995). Even by his own account of events, defendant was not engaged in a lawful enterprise at the time of the shooting, having armed himself with a loaded gun before breaking into Davis' house bent on a confrontation. Defendant's claim that one of the two shots fired at Janneh was unintentional is unavailing. *See State v. Lytton*, 319 N.C. 422, 425-26, 355 S.E.2d 485, 487 (1987)). "Where, as here, the evidence is uncontroverted that the defendant was engaged in unlawful conduct and acted with a wrongful purpose when the killing occurred, the trial court does not err in refusing to submit the defense of accident." *Riddick*, 340 N.C. at 343, 457 S.E.2d at 731-32.

The record on appeal contains an additional assignment of

error not addressed in defendant's brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem it abandoned.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).