NO. COA04-344-2

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

STATE OF NORTH CAROLINA

v. Rockingham County
No. 03 CRS 641

BRIAN KEITH MURPHY,
Defendant.

Appeal by defendant from judgment entered 28 July 2003 by Judge W. Douglas Albright in Rockingham County Superior Court. Originally heard in the Court of Appeals 18 November 2004. *See State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567 (2005). Upon remand by order filed 29 December 2006 from the North Carolina Supreme Court, which reversed and remanded to this Court for reconsideration in light of its decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). *See State v. Murphy*, 361 N.C. 176, ___ S.E.2d ___ (2006).

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellant.

TYSON, Judge.

This Court initially addressed Brian Keith Murphy's ("defendant") appeal from his jury conviction for second degree murder. We held no error occurred at trial, but remanded for

resentencing in light of our Supreme Court's decision in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). *See State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567 (2005). The State petitioned for discretionary review. Our Supreme Court entered an order that: (1) allowed the State's petition for discretionary review; (2) vacated that portion of this Court's opinion remanding to the trial court for resentencing; and (3) remanded the matter to this Court for reconsideration of our holding in light of its decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). *See State v. Murphy*, 361 N.C. 176, ___ S.E.2d ___ (2006). On remand, we hold that any errors which occurred in defendant's sentencing were harmless beyond a reasonable doubt.

I. Background

On 3 February 2003, a grand jury indicted defendant for the first-degree murder of three-year-old Brian Keith May. On 28 July 2003, a jury convicted defendant of second degree murder.

Prior to sentencing defendant, the trial court found as aggravating factors that: (1) the victim of the crime was very young; (2) defendant took advantage of a position of trust or confidence to commit the offense; and (3) defendant was absent without leave from the United States Army at the time of the offense. The trial court found as a mitigating factor that defendant had a good reputation in the community in which he lived. The trial court concluded the aggravating factors outweighed the mitigating factor and sentenced defendant in the aggravated range of 192 to 240 months of imprisonment.

II. Aggravating Factors

Defendant argues the trial court erred by sentencing him in the aggravated range because the aggravating factors were found by the trial court and not submitted to the jury.

Our Supreme Court recently examined the constitutionality of North Carolina's structured sentencing scheme in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and *Washington v. Recuenco*, ___ U.S. ___, 165 L. Ed. 2d 466 (2006). *Blackwell*, 361 N.C. at 42-45, 638 S.E.2d at 453-55. In *Blackwell*, our Supreme Court concluded that *Blakely* error is subject to harmless error analysis and a trial court's finding of an aggravating factor does not violate Article I, Section 24 of the North Carolina Constitution. 361 N.C. at 42-45, 638 S.E.2d at 453-55.

In *Blakely*, the United States Supreme Court reiterated the rule first stated in *Apprendi*, "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455). In *Recuenco*, the United States Supreme Court held that an error under *Blakely* is not *per se* or structural error and is subject to federal harmless error analysis. ___ U.S. at ___, 165 L. Ed. 2d at 474-77.

Here, the trial court committed error under *Blakely* and *Apprendi* by unilaterally finding three aggravating facts, which increased the penalty for defendant's crime beyond the presumptive or prescribed statutory maximum. *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455. This error is subject to further review to determine whether these errors were harmless beyond a reasonable doubt. *Recuenco*, ___ U.S. at ___, 165 L. Ed. 2d at 474-77; *Blackwell*, 361 N.C. at 42, 638 S.E.2d at 453.

III. Harmless Error Analysis

The State argues the trial court's *Blakely* errors were harmless beyond a reasonable doubt. We agree.

Our Supreme Court has stated:

> In conducting harmless error review, we must determine from the record *whether the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt*. The defendant may not avoid a conclusion that evidence of an aggravating factor is uncontroverted by merely raising an objection at trial. Instead, the defendant must bring forth facts contesting the omitted element, and must have raised evidence sufficient to support a contrary finding.

Blackwell, 361 N.C. at 49-50, 638 S.E.2d at 458 (internal citations and quotations omitted) (emphasis supplied).

A. Victim of the Crime was Very Young

The trial court found as an aggravating factor that the victim of the crime was very young. Defendant testified, and evidence in the record showed, the victim in this case was three-years-old.

Defendant admitted, and other uncontested evidence tended to show, the victim of the crime was very young. *Blackwell*, 361 N.C. at 49-50, 638 S.E.2d at 458. Any rational finder of fact would have found this aggravating factor to exist beyond a reasonable doubt. *Id.*

B. Position of Trust or Confidence

The trial court also found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. This aggravating factor depends "upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987). In *Daniel*, our Supreme Court found, "A relationship of trust or confidence existed because defendant was the child's mother and because she was singularly responsible for its welfare." 319 N.C. at 311, 354 S.E.2d at 218.

Defendant testified he "was basically being a father figure" to the victim and that "ever since [he] and [the victim's mother] got together, [he] started being a guardian to [the victim]." Defendant also testified he babysat the victim "every day."

Substantial evidence was also presented that the victim received injuries causing his death while he was in defendant's sole care. Defendant testified he was the child victim's "father figure" or "guardian" and was singularly responsible for his welfare at the time the victim received the injuries which caused his death. *See State v. Sallie*, 13 N.C. App. 499, 511-12, 186

S.E.2d 667, 674-75 (Presumption of malice arises when death ensues from an attack upon an infant.), *cert. denied*, 281 N.C. 316, 188 S.E.2d 900 (1972).

Uncontroverted and overwhelming evidence was presented at defendant's trial tending to show defendant took advantage of a position of trust or confidence to commit the offense. *Blackwell*, 361 N.C. at 49-50, 638 S.E.2d at 458. We hold that a rational finder of fact would have also found this aggravating factor to exist beyond a reasonable doubt. *Id.*

C. Absent Without Leave

The trial court also found as an aggravating factor that defendant was absent without leave from the United States Army at the time the offense occurred. Michelle May ("May"), the victim's mother, was asked if she knew defendant's status with the military on 4 November 2002, the date of the offense. May responded, "He was AWOL." May testified she knew defendant was "AWOL" based upon discussions she and defendant had when he moved in with her and the victim. This testimony was uncontroverted by defendant.

Uncontroverted evidence was presented tending to show that defendant was absent without leave from the United States Army at the time of the offense. *Id.* We hold a rational finder of fact would have also found this aggravating factor to exist beyond a reasonable doubt. *Id.*

IV. Conclusion

Uncontroverted and overwhelming evidence was presented at defendant's trial in support of the three aggravating factors found

to exist by the trial court. *Id.* The trial court's *Blakely* errors were harmless beyond a reasonable doubt. Remand for resentencing is not warranted.

Harmless Error.

Judges GEER and STROUD concur.

Report per Rule 30(e).