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NO. COA04-425-2

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v.

Durham County
No. 01 CRS 050252

RODNEY EARL COFFIN

On remand based on order of Supreme Court filed on 29 December 2006, vacating and remanding the unanimous decision of the Court of Appeals, *State v. Coffin*, 171 N.C. App. 515, 615 S.E.2d 738 (2005) (unpublished opinion), for reconsideration in light of the Supreme Court's opinion in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). Appeal by defendant from judgment entered 7 November 2003 by Judge Howard E. Manning, Jr., in Durham County Superior Court. Originally heard in the Court of Appeals 17 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Benjamin M. Turnage, for the State.

Winifred H. Dillon, for defendant.

LEVINSON, Judge.

This case comes before us on remand from the North Carolina Supreme Court in order that we may reexamine the issue of sentencing in light of its recent decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006).

During defendant's sentencing hearing after his plea to second

degree murder, the trial court found an aggravating factor in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and sentenced defendant to an aggravated term of imprisonment. We now determine whether the trial court's error is harmless beyond a reasonable doubt.

During the plea hearing, the prosecutor "incorporated by reference the record in this case" as a factual basis for defendant's plea to second degree murder. Defendant's plea was entered after a mistrial during which the State contended that defendant committed the first degree murder of Bonnie Bassett by shooting her in the head twice while she laid in a bed she and defendant shared in their home. At trial, the State's evidence tended to show that defendant turned himself in to law enforcement authorities after the shooting. Defendant and Bassett had a young child together. He informed authorities that, after an argument with Bassett in the morning hours, he went into another room; smoked a cigarette; retrieved a small handgun from a drawer; and "just shot her" twice in the left temple. Although he had used cocaine in the past, he was not using the same in the hours leading up to the shooting. He was having "problems" with his ex-girlfriend; she was "keeping [his] kids away from him"; and he was having "financial problems." At trial, defendant attacked the credibility of the police investigation, attempting to raise the possibility that Bassett committed suicide by inflicting the fatal wounds. For example, defendant asserted, the police did not conduct a gun residue examination on Bassett's hands. Defendant

also argued that he did not possess the specific intent to commit first degree murder.

Following the mistrial and defendant's plea to second degree murder, the trial court found the aggravating factor contained in N.C. Gen. Stat. § 15A-1340.16(d)(15), that "defendant took advantage of a position of trust or confidence . . . to commit the offense[,]" and sentenced him to an aggravated term of imprisonment.

With respect to this aggravating factor, the Supreme Court recently summarized cases where our appellate courts have either sustained or rejected this aggravating factor. *State v. Munn*, 355 N.C. 294, 318-19, 560 S.E.2d 776, 791-92 (2002). In the context of a marriage, the Supreme Court has stated that the "trust or confidence" contained in factor (d)(15) "'depends . . . upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other.'" *State v. Arnold*, 329 N.C. 128, 144, 404 S.E.2d 822, 832 (1991) (quoting *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987)). While concluding that the "trust or confidence" aggravating factor can apply to husband-wife relationships, the Court stated that "[i]n some marriage-related situations, finding this aggravating factor may be inappropriate." *Id.* In *Arnold*, a pre-*Blakely* opinion, the issue of whether the victim trusted his wife was an important consideration in the Court's evaluation of whether the trial court erred in finding the "trust or confidence" factor. *Id.*

In *Blackwell*, 361 N.C. 41, 638 S.E.2d 452, the Court

considered whether the State "carried its burden of proving that the *Blakely* error which occurred at defendant's . . . trial was harmless beyond a reasonable doubt." *Id.* at 45, 638 S.E.2d at 456.

The Court 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 factfinder would have found the disputed aggravating factor beyond a reasonable doubt. [*Neder v. United States*, 527 U.S. 1, 9 (1999)] (internal quotation marks omitted); see N.C.G.S. § 15A-1443(b) (2005); *State v. Heard*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974) ("[B]efore a court can find a Constitutional error to be harmless it must be able to declare a belief that such error was harmless 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. See, e.g., *Neder*, 527 U.S. at 19. Instead, the defendant must "bring forth facts contesting the omitted element," and must have "raised evidence sufficient to support a contrary finding." *Id.*

Id. at 49-50, 638 S.E.2d at 458.

Here, defendant and Bassett had a child together and shared a household. Defendant shot Bassett while she was in the couple's bed. During the trial proceedings that resulted in a mistrial because of the jurors' inability to reach an unanimous determination of defendant's guilt, there was little evidence admitted that concerned the nature and quality of Bassett's relationship with defendant. We have reviewed the transcript and the record very carefully, and cannot conclude that a jury would have agreed that the defendant took advantage of a "position" of

trust or confidence in committing the offense. We therefore reverse and remand for a new sentencing hearing where the prosecutor and defendant are afforded an opportunity to present evidence concerning this aggravating factor.

Reversed and remanded for resentencing.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).