COA04-66

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

STATE OF NORTH CAROLINA

v. Randolph County
No. 01 CRS 53187

TEREASA LYNN GIBSON

Appeal by defendant from judgment entered 30 May 2003 by Judge Michael E. Helms in Randolph County Superior Court. Heard in the Court of Appeals 23 September 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for the defendant.

LEVINSON, Judge.

Defendant (Gibson) appeals from conviction and judgment for voluntary manslaughter. She argues she is entitled to a new trial because: (1) the trial court erroneously refused to submit the verdict of involuntary manslaughter to the jury; (2) the trial court erroneously instructed the jury on an aggressor theory of manslaughter that was not supported by the evidence; and (3) the prosecutor made improper remarks during closing argument. Defendant's twenty-one additional assignments of error are not brought forth in her brief and are therefore deemed abandoned. N.C.R. App. P. 28(b)(6).

FACTS

Evidence at Gibson's trial tended to show the following. On 25 June 2001, Henry Roy Taylor, Jr. and defendant had lived together for approximately seven years and had a child together. On the night of Taylor's death, defendant had spent the evening playing pool at a bar owned by her parents. When she returned home, defendant and Taylor started to argue. In the early morning hours of 26 June 2001, Taylor died of a stab wound to the chest. Defendant admitted stabbing Taylor. There were no other witnesses.

The morning of 26 June 2001, defendant gave a statement to Lieutenant Barry Bunting, a deputy sheriff with the Randolph County Sheriff's Office. The statement, which was read into the record and published to the jury, included the following narrative:

> Henry grabbed me by the throat. He said, "you no [sic] what?" I said, "you're going to break my neck." He pushed me down on the love seat. He said he was tired of me going to the bar. I told him I was tired of him hitting on me. He has hit me before. I went in the house and shut the door. Henry came in and pushed me from behind. Our son came in the kitchen and Henry picked him up. He said, "I want my mommy." I took him in our bedroom . . . and put him on the bed. Henry came in there running his mouth, so I told [our son] to stay in here. I went back in the kitchen. Henry grabbed me by the arm and I slapped him on the arm. Then Henry slapped me in the face. And I then punched him in the face. Then he pushed me into the dryer. I moved the dryer back in its place as Henry walked off. I then got a knife from the kitchen drawer. The knife was a utility knife with a black handle and the blade was about five or six inches long. Henry said, "what are you going to do with that?" I said, "nothing just scare you. I'm tired of you hitting and choking me." I

> even asked him to just leave for the night. He asked me again what I was going to do with the knife. I said nothing. Henry said then just put the damn thing down. Then he hit me in my hand. I brought the knife up and said, "quit hitting me." As this was happening, Henry was coming at me. I just stabbed him. I put my hand down and started backing up. And Henry said, "you just stabbed me." He said, "pull it out. Pull it out." Henry tried but couldn't. I looked and saw the handle in my hand and the blade was in his chest. I tried to pull it out but couldn't. . . .

Defendant called 911. The tape recording of the call was played for the jury.

> . . . .
>
> DEFENDANT: Oh my God. My boyfriend was hitting me and I stabbed him. Please hurry.
>
> OPERATOR: Somebody is on the way.
>
> . . . .
>
> DEFENDANT: There is a knife in his chest and the blade part is still stuck in his chest and I can't get it out. Please hurry.
>
> OPERATOR: Where is he right now?
>
> DEFENDANT: Laying on the kitchen floor.
>
> OPERATOR: Did you stab him?
>
> DEFENDANT: Yes I did because he was hitting me. I didn't mean to. I was just trying to protect myself. I didn't want to hurt him. Please hurry.
>
> OPERATOR: Help is on the way.
>
> DEFENDANT: I was getting up and he hit me. Please help me. Oh God. Please hurry. I didn't mean to. He was hitting me. I didn't mean to hurt him. I promise I didn't. I just wanted him to stop hitting me. . . .

One of the first officers to arrive on the scene, Sergeant George Morris of the Randolph County Sheriff's Office, testified that when he approached defendant he detected "a strong odor of alcohol coming from her." He stated she was "mumbling some things to me, such as[,] you know, I didn't mean to do it but he wouldn't stop hitting me."

At trial, defendant told the jury that she took the knife from the kitchen drawer because decedent's violent behavior that night made her fear she was in danger of serious bodily harm. She stated that when she brandished the knife, decedent "was still fussing and cussing and lunged at me." She stepped back and fell against the washing machine:

> And Henry stood up and I moved away from the washing machine and started backing up. And he said, "[O]h, my God. You just stabbed me." And he backed up [a] few steps into the living room and lifted his chest up and I was at the refrigerator. And I looked at my left hand and there was just the handle there.

Defendant testified that she "didn't realize it had happened until he lifted his shirt up and told me that I had just stabbed him." Moreover, defendant testified that the victim had physically abused her during their relationship, though she acknowledged that she had never called the police, seen a doctor, or told her neighbors about physical abuse. She also stated that on the night of the homicide, Taylor grabbed her by the throat and by the arm, slapped her in the face, and flung her against a clothes dryer located in the kitchen area. She further testified that before that night, Taylor had

never struck her in the face. Defendant did not require medical attention the night of Taylor's death.

On cross examination, defendant stated that she did not recollect actually stabbing Taylor. She maintained that Taylor lunged at her, and that when she leaned back, she had the broken knife handle in her hand and the knife blade was stuck in Taylor's chest. She was unable to explain how Taylor came to suffer the stab wound to his left groin region. Officer John Garner testified he observed red stains, appearing to be blood, on the door jamb between the living room and the kitchen and blood in several spots in the living room. Officer Garner detected a "blood trail" which he believed originated in the living room and proceeded back toward the kitchen. Defendant was unable to explain how the blood was spilled in the living room.

Defendant was five feet, five and one half inches tall and weighed 120 pounds at that time. Decedent was six feet tall and weighed 210 pounds.

Dr. Robert Thompson, then forensic pathologist at the Office of the Chief Medical Examiner in Chapel Hill, performed the autopsy on decedent. He noted one small abrasion on the back of decedent's right hand, as well as two major stab wounds — one in the mid-chest area, and the other in the left groin area. He testified the victim's wound margins were consistent with a serrated knife. The wound to the groin was three inches deep. The fatal chest wound was three and three-quarter inches deep and penetrated the right ventricle of the heart. The knife that produced the wound had

traveled in a "backward" and "downward" direction into the chest, and the wound tract was consistent with an overhand downward stabbing motion. He estimated the time between the stabbing to the chest and death at approximately three minutes.

Defendant's friend, Rachel Rice, testified that on one occasion, while staying at the home of Taylor and Gibson a year prior to Taylor's death, she witnessed a physical altercation between the two in which Taylor "grabbed [Gibson] by the neck and throw'd [sic] her into the wall and grabbed her by the hair and jerked her back down." Rice stated she did not call the police at that time because "it wasn't my business."

Another friend of defendant, Robin Lane, corroborated Gibson's testimony that once when Gibson was standing outside Taylor's truck and the two were arguing, Taylor had held Gibson's arms as Taylor drove the truck down the street, dragging Gibson along. On cross-examination, Lane admitted that when Gibson returned to the house and told Lane about the incident, Lane did not see any injuries or physical evidence of abuse of any kind.

Defendant's mother testified at trial but did not offer testimony concerning any purported domestic abuse. The State presented evidence of Taylor's good reputation for peacefulness in his community.

Defendant does not now characterize her stabbing of Taylor as an accident, and she expressly declined a jury instruction on homicide by accident. Her theory at trial was that she killed Taylor in self-defense.

I.

We first address defendant's contention that because the facts support a verdict of involuntary manslaughter, the trial court erred in failing to so charge the jury. After careful consideration, we reject this argument.

North Carolina law defines four different types of homicide as follows:

> Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.
>
> Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.
>
> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. . . .
>
> Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.

State v. Norris, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981) (citations omitted). Under North Carolina law,

> a lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit [her] of the greater. The test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.

State v. Thomas, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citations and internal quotations omitted); *accord State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002).

Defendant was indicted and tried for second degree murder. The trial court properly instructed the jury on the elements of second degree murder and voluntary manslaughter, but declined defendant's request for an instruction on involuntary manslaughter.

Our State has long defined involuntary manslaughter as

> the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the performance of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existing at the time. . . .

State v. Davis, 66 N.C. App. 334, 337, 311 S.E.2d 311, 313 (1984) (citations omitted). Thus, to warrant an instruction on involuntary manslaughter, there must be evidence that could permit a jury rationally to find that the defendant acted unlawfully but without malice and without intention to kill or to inflict serious bodily injury. *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 893 (1963). Moreover, the act or omission must not amount to a felony, nor be naturally dangerous to human life. *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978).

A.

In the instant case, submission of an instruction on involuntary manslaughter was not required because the evidence adduced at trial does not support the first element of involuntary manslaughter: that defendant acted without intention to kill or to

inflict serious bodily injury. By defendant's own account, the victim was walking away from her when she decided to pick up the knife. Defendant twice plunged a knife into her victim, with a downward stabbing motion, to a depth of at least three inches. Defendant produced two different wounds on the victim's body. With the first thrust of the knife, defendant produced a cut in the victim's groin area. Defendant offered no explanation for how the victim was stabbed in the groin. With the second thrust of the knife the serrated blade pierced the right ventricle of Taylor's heart, proximately resulting in his speedy death. After the second thrust, the knife handle broke off with the knife blade still in the victim's chest; defendant was unable to remove the blade from defendant's chest. Viewing the totality of the evidence, defendant's bare assertion that she "didn't mean to" is not sufficient evidence from which a reasonable jury could infer that she acted without intent to either kill or to inflict serious bodily injury.

The instant case resembles those cases where "[o]ther than the defendants' assertions that they had not meant to kill, there was no evidence that the killings were accidental." *State v. McConnaughey*, 66 N.C. App. 92, 97, 311 S.E.2d 26, 30 (1984). In these situations our courts have held that the resulting homicide was at least voluntary manslaughter, and that submission of a charge of involuntary manslaughter was error. *Id.* *See also State v. Ray*, 299 N.C. 151, 261 S.E.2d 789 (1980) (holding instruction on involuntary manslaughter was prejudicial error where there was no

evidence of involuntary manslaughter, and the defendant relied on self-defense for an acquittal to the other degrees of homicide). Thus, because the evidence would only allow a reasonable jury to conclude that defendant deliberately engaged in an act likely to result in death or serious bodily injury, she is not entitled to an instruction on involuntary manslaughter.

B.

Although not essential to our holding, we further address defendant's argument that the facts resemble our cases in which an unintentional or inadvertent stabbing compelled an instruction on involuntary manslaughter.

This Court has held that "[e]vidence indicating that [the victim's] death was caused by defendant inadvertently stabbing him in the chest while not attempting or intending to do so" may satisfy the requirement that the killing was the result of an act done in a culpable or criminally negligent manner, such that an instruction on involuntary manslaughter is proper. *State v. Daniels*, 87 N.C. App. 287, 289, 360 S.E.2d 470, 471 (1987). *See also State v. Drew*, 162 N.C. App. 682, 686, 592 S.E.2d 27, 30, *disc. review denied*, __ N.C. __, __ S.E.2d __ (2004). Thus, to warrant an instruction on involuntary manslaughter where death is by stabbing, the defendant must show facts that could support a finding that the act of stabbing was an inadvertent, culpably negligent act: neither a result of mere accident, on the one hand; nor done with intent to inflict serious bodily injury on the other. *See State v. Buck*, 310 N.C. 602, 605, 313 S.E.2d 550, 552 (1984)

("[I]nvoluntary manslaughter can be committed by the wanton and reckless use of a deadly weapon such as a firearm . . . or a knife[.]").

Several of our cases illustrate facts from which an involuntary manslaughter instruction was appropriate because a jury could find that an unintentional or inadvertent stabbing was committed by the culpably negligent use of a knife. In *Daniels*, we found no error where a trial court instructed on involuntary manslaughter where "evidence indicat[ed] that [victim's] death was caused by defendant inadvertently stabbing him in the chest while not attempting to or intending to do so." *Daniels*, 87 N.C. App. at 289, 360 S.E.2d at 471. Defendant testified that while fending off the attack of her domestic partner, she had not meant to hurt him. During a violent altercation he handed her a boning knife with a six and one-half inch blade and told her to fight him back "like a man." *Id.* at 288, 360 S.E.2d at 470. She stabbed him one time in the chest. On appeal, defendant argued the trial court should not have instructed on involuntary manslaughter and urged this Court to conclude, *inter alia*, that her acts constituted self-defense as a matter of law. We disagreed, holding that the facts supported the verdict. Daniels, while fighting with the victim, "struck at him, trying to get him away from [her]," but "she did not intend to either stab or hurt" him. *Id.* We held that "evidence indicating that [the victim's] death was caused by defendant inadvertently stabbing him in the chest while not attempting or intending to do so clearly meets [the] requirement" that the killing was the result

of an act done in a culpable or criminally negligent way. *Id.* at 289, 360 S.E.2d at 471.

Similarly, in *State v. Drew*, 162 N.C. App. 682, 592 S.E.2d 27, the defendant argued that an instruction on involuntary manslaughter was improper because the facts clearly showed his intent was to stab the victim in self-defense. We disagreed because

> a jury could find that defendant, who had been told that no one was in the house, was surprised in the bathroom by a man whom he did not immediately recognize; that the intruder lunged or swung at [defendant]; that [defendant] immediately swung back holding the knife; and that [defendant] ran away out of fear. The jury could also find . . . that defendant did not know that he had stabbed [the victim] and that he did not intend to kill him.

Id. at 686, 592 S.E.2d at 30. Thus, a jury reasonably could have found the fatal stabbing to be unintentional — an act of culpable negligence where defendant swung a knife at someone he believed to be an intruder.

While the facts in *Daniels* and *Drew* could support a verdict of involuntary manslaughter based on the culpably negligent use of a knife causing an unintentional or inadvertent stabbing, the facts in the instant case, by contrast, cannot support such a verdict. The facts in the case at bar resemble those in *State v. Davis*, 66 N.C. App. 334, 311 S.E.2d 311, in which we found no error in a conviction for voluntary manslaughter where the victim died of multiple stab wounds. In *Davis*, defendant testified that when he discovered his girlfriend's male acquaintance, Lowery, in the

apartment defendant shared with his girlfriend, he ordered him to leave, but became angry when Lowery "just stood there and didn't want to leave." *Id.* at 336, 311 S.E.2d at 312. Defendant then attacked Lowery.

> According to defendant, the two of them then began to fight with each other. As they struggled with each other, defendant picked up the knife, and as he came around with it, Lowery grabbed the hand which defendant held the knife in. Lowery tried to force the knife into defendant, who was trying to force the knife away. They bumped against cabinets as they struggled with the knife. Defendant testified further that he did not try to cut Lowery, he was only trying to protect himself and he does not know how Lowery was stabbed.

Id. We held that the *Davis* trial court did not err when it declined to instruct the jury on involuntary manslaughter, because the facts could not support such a verdict:

> It is clear, from defendant's own testimony, that defendant was not entitled to have involuntary manslaughter submitted as a possible verdict. Defendant's conduct in *intentionally* grabbing the knife and moving it toward the deceased during the course of a fight initiated and aggressively pursued by defendant, constituted an act naturally dangerous to human life in that the fatal consequences were probable under all the facts existing at the time. There was no evidence to support a verdict of involuntary manslaughter and the trial court was correct in not submitting it as a possible verdict.

Id. at 338, 311 S.E.2d at 313.

Likewise in the instant case, Gibson was not entitled to have involuntary manslaughter submitted as a possible verdict because her behavior, in wielding the knife upon which Taylor twice became impaled to a depth of at least three inches, constituted, at the

very least, acts naturally dangerous to human life. According to defendant's own testimony, Taylor retreated to the living room before defendant armed herself with a knife from the kitchen. A trail of blood led from the living room to Taylor's body in the kitchen, suggesting Gibson followed Taylor into the living room and stabbed him there. He was stabbed not once but twice, with a downward motion. The knife that produced the fatality remained in the victim's chest after the killing, which permits an inference that defendant stabbed the victim in the groin before stabbing him in the chest. The stab wound to the groin was never explained by defendant. Immediately after the incident, defendant told the 911 operator and police that she had stabbed Taylor and that when she did so, the knife handle broke off in her hand. This assignment of error is overruled.

II.

Defendant next contends that she is entitled to a new trial because the trial court erroneously submitted voluntary manslaughter to the jury where such an instruction was unsupported by the evidence. She claims that the evidence does not support the theory that she was the aggressor in bringing on the affray.

The law defines two kinds of self-defense as a defense to murder. The law of "perfect" self-defense excuses a killing altogether if, at the time of the killing, (1) it appeared to the defendant, and the defendant believed, it was necessary to kill to save herself from death or great bodily harm; (2) this was a reasonable belief; (3) the defendant was not the aggressor in

bringing on the affray; and (4) the defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to her to be necessary under the circumstances to protect herself from death or great bodily harm. *State v. Richardson*, 341 N.C. 585, 587-88, 461 S.E.2d 724, 726 (1995) (citations omitted). If elements (1) and (2) are present but either (3) or (4) is absent, the defendant is said to have an "imperfect" right of self-defense. With "imperfect" self-defense a killing is not completely excused, and the defendant is guilty of at least voluntary manslaughter. *Id.* at 588, 461 S.E.2d at 726-27 (citations omitted).

The defense failed to argue before the trial court that the aggressor theory was unsupported by the evidence, although the court invited counsel to do so. During the charge conference, the following exchange took place:

> THE COURT: [W]e have two choices here, that the defendant was the aggressor in bringing on the fight or used excessive force. What says the State with regard to those two options? You could argue aggressor in the fight because he walked away and then she picked up the knife, and the jury could find that that was a sufficient act of aggression to warrant that to be in the jury's consideration. You might want to argue that she used excessive force because it wasn't necessary [for] a person of her size – if the facts were as she contends – that she didn't need a knife. Excessive force, that's for the jury to decide. What says the State?
>
> [STATE]: I think they both work perfectly well, Your Honor.
>
> THE COURT: What do you say, [counsel for the defense]?

> [DEFENSE]: Well, I object for the record.
>
> THE COURT: I believe the evidence is weak on her being the aggressor.
>
> [DEFENSE]: Actually, I'm – if you want to put it in, I'm comfortable arguing. I guess that's where I come from.
>
> THE COURT: I understand. I think there's sufficient evidence to justify giving it, so I will give both. . . .

Rule 10(b)(2) of the N.C. Rules of Appellate Procedure states: "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, **stating distinctly that to which he objects and the grounds for his objection**[.]" Defense counsel's generic objection "for the record" fails to inform the trial court whether he is objecting to a jury charge on the aggressor theory or on the excessive force theory. Moreover, his statement "if you want to put it in, I'm comfortable arguing" effectively withdraws his objection. Rule 10 functions as an important vehicle to ensure that errors are not "built into" the record. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983). "[N]o such error ought be subject of appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel." *Id.* (citing, with approval, Rule 10 official commentary).

Although defendant is entitled only to plain error review, we nonetheless exercise our discretion under Rule 2 of the N.C. Rules

of Appellate Procedure and review fully the trial court's instruction. We find no error, "plain" or otherwise. The facts clearly support submission of the instruction. The jury could have found that defendant was the aggressor in that, according to her own testimony, Taylor had retreated from the fight before defendant grabbed the knife. Taylor walked out of the kitchen and into the living room. It was only then that defendant armed herself with the knife from the kitchen drawer. The trail of blood leading from the living room to the kitchen further supports the theory that defendant pursued Taylor into the living room with the knife, initially stabbing him there, though he died in the kitchen.

> '[I]f one takes life, though in defense of h[er] own life, in a quarrel which [s]he h[er]self has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which [s]he has been placed by the act of h[er] adversary constitutes no defense whatever, but [s]he is guilty of murder. But, if [s]he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then [s]he is not acquitted of all responsibility for the affray which arose from h[er] own act, but h[er] offense is reduced from murder to manslaughter.'

Norris, 303 N.C. at 532, 279 S.E.2d at 574 (quoting *State v. Crisp*, 170 N.C. 785, 793, 87 S.E. 511, 515 (1916)). This assignment of error is overruled.

III.

Finally, defendant contends that improper closing remarks by the prosecutor impeded her right to a fair trial. We disagree. Our Supreme Court has extended appellate review "of a prosecutor's argument for *gross* impropriety in absence of an objection at trial"

to noncapital cases. *State v. Jones*, 317 N.C. 487, 500, 346 S.E.2d 657, 664 (1986). It is well settled in North Carolina that counsel is allowed wide latitude in the argument to the jury, and the control of the arguments of counsel must be left largely to the discretion of the trial judge. "[T]he appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citations omitted).

The defendant complains that the prosecutor improperly asserted his personal opinion about defense counsel's credibility and professionalism when he suggested that bruises defendant claimed to have suffered were not visible in photographs shown to jurors:

> There was no hide the ball here. . . . [Defense counsel] says there's a bruise on the outside of [defendant's] hand. I mean, there might be. I don't know. But what I saw was the same thing you did. . . . But the game is being played on you – the game really comes in when we start talking about the bruises to the neck. That's where the game's starting. Because you folks saw right here on this monitor two blown-up pictures that [defense counsel] took that they didn't want to show you that showed there [were] no bruises on her neck. You have a right to ask what's that about. These pictures, there is not a bruise on her neck anywhere. . . . There may be a game played in this, but I'm not playing it. These pictures, the physical trail of blood left, the physical evidence at the scene, they tell their own story. I don't need to fabricate or hide evidence. It's right here.

Our review of the transcript indicates the prosecutor was attempting to refute sentiments expressed earlier by the defense during its closing argument: "The State in this case has played the bruise game." The trial judge's failure to intercede *ex mero motu* does not constitute an abuse of discretion. This assignment of error is overruled.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).