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NO. COA05-1000

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

STATE OF NORTH CAROLINA

v.

ROBERT ALEXANDER VERBAL

Moore County  
Nos. 03 CRS 050551  
03 CRS 050674

Appeal by defendant from judgment entered 12 August 2004 by Judge Ronald E. Spivey in Moore County Superior Court. Heard in the Court of Appeals 29 March 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.*

*Nora Henry Hargrove, for defendant-appellant.*

*Bruce T. Cunningham, Jr. and Holly Bryan, for Amicus Curiae North Carolina Academy of Trial Lawyers.*

TYSON, Judge.

Robert Alexander Verbal ("defendant") appeals from judgment entered after a jury found him to be guilty of felony murder and conspiracy to commit armed robbery. Defendant was sentenced to life imprisonment without parole. We find no error.

#### I. Background

##### A. State's Evidence

On 6 February 2003, Maurice Nealy ("Nealy") suggested to defendant, Chris Barkley ("Barkley"), and Eric Perkins ("Perkins")

that they should rob his neighbor and known drug dealer, Rodrick Hammond ("Hammond"). Nealy offered defendant a loaded .380 caliber handgun for defendant to use in the robbery. Defendant gave Barkley his .25 caliber handgun to use in the robbery. Perkins drove them to Nealy's home located in Hammond's neighborhood.

Hammond was at home with his uncle, David Blue ("Blue"), his girlfriend, Kim Fairley ("Fairley"), and Fairley's children when someone knocked on Hammond's back door. Defendant and Barkley entered Hammond's house. Defendant walked towards Hammond pointing his gun. Hammond grabbed the gun to move it away from his face. The gun discharged and shot Hammond in the hand.

Fairley heard "some shoving" and someone demand, "give it up." After walking into the hallway, she saw defendant and Barkley with "guns out." Barkley shoved a gun in her face and told her to go back to her room.

Hammond struggled with defendant, but failed to gain control of the pistol. Hammond saw Blue struggling with Barkley at the back door. Hammond escaped and ran to a neighbor's house. While Hammond ran, he heard a gunshot and called the police.

Perkins picked up defendant and Barkley and drove away from the scene. Nealy was also present inside the vehicle. Defendant told Nealy the gun "was hot," and he had shot someone. Perkins saw defendant holding a silver gun and wiping it down. Defendant returned the .380 to Nealy. Defendant stated he had "shot him in the leg" and complained Barkley did not do what was planned.

Barkley told defendant he was unable to shoot the gun because the safety lock was engaged.

Police responded to Hammond's call and Hammond directed them to his house. Fairley informed Hammond that Blue had been shot. Hammond retrieved money hidden in his house and rode in the ambulance with Blue to the hospital. Police later discovered drugs near the location where Hammond had retrieved the money.

Investigators recovered three .380 caliber spent shell casings from the scene, two from the hallway of the residence and one from the floor inside the bedroom where Blue was found dead. Ballistic testing confirmed two of the shell casings had been fired from the same weapon. These casings also possessed the same characteristics as those fired from the .380 caliber handgun police had seized as a part of the investigation. Two bullets recovered from Blue's body were fired from that .380 caliber handgun. Blue died from a gunshot wound to his abdomen. An absence of gunpowder on Blue's skin indicated his wounds did not result from contact or close-range shots.

Defendant provided investigators with the .25 caliber pistol. Defendant asserted he had carried the .25 caliber pistol and that Barkley had carried the .380 caliber pistol. Defendant told investigators he was not scared, did not shoot anyone, and knew he should not have accompanied Barkley, who he referred to as "that crazy fool."

B. Defendant's Evidence

Defendant testified he knew Nealy and "hung with him from time to time." Defendant knew Barkley and "sold drugs to him from time to time." On 6 February 2003, defendant was present at his girlfriend, Deitra Cole's, house. When Nealy entered her house, defendant was "drinking beer" and smoking marijuana. Nealy asked defendant to rob Hammond, and he refused. Defendant admitted he borrowed a gun from Nealy, but had no intention of using it to rob Hammond.

Defendant and Barkley proceeded to Hammond's house allegedly to buy more marijuana. Blue allowed defendant to enter the house, and defendant greeted Fairley. Fairley told defendant that Hammond was in the middle bedroom. Barkley remained at the back door with Blue. Defendant approached Hammond and offered to buy some marijuana. As defendant reached for his money, the .380 caliber handgun fell out of his pocket. Defendant and Hammond struggled to gain control of the gun. As the two struggled, the gun discharged and shot a third party in the leg. Hammond yelled for Blue. Defendant and Hammond continued to struggle and moved into the hallway. Defendant observed Blue and Barkley "tussling by the door." Defendant testified the gun discharged two more times. Defendant gained control of the gun and ran out of the house. Barkley followed him.

Perkins picked defendant and Barkley up. Nealy was also present in the vehicle. Defendant admitted he told Nealy he had shot someone in the leg and that the gun was "hot." Defendant gave Nealy the .380 caliber handgun. Perkins dropped defendant off at

his uncle's house. Defendant was concerned police would search for him at his home. Defendant admitted using marijuana and selling crack cocaine. He also admitted he had been drinking alcohol and smoking marijuana all day when Blue was killed.

Defendant was found guilty of felony murder and conspiracy to commit armed robbery. Defendant was sentenced to life imprisonment without parole. Defendant appeals.

## II. Issues

Defendant argues: (1) he received ineffective assistance of counsel; (2) the imposition of life without parole when the jury did not find an intent to kill constitutes cruel and unusual punishment; and (3) the mandatory imposition of a sentence of life without parole when no intentional killing occurred is an impermissible intrusion by the legislative branch upon the authority of the judicial branch to determine the appropriate sentence for the crime and the offender.

### III. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of counsel when his trial counsel told the jury the State presented sufficient evidence of the attempted armed robbery. We disagree.

#### A. Standard of Review

\_\_\_\_ In *Strickland v. Washington*, the United States Supreme Court provided a two-prong test for a defendant to establish ineffective assistance of counsel. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The test requires:

First, the defendant must show that counsel's performance was deficient. This requires

showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.*

Our Supreme Court has stated, "this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct" when reviewing ineffective assistance of counsel claims. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004). In *State v. Lowery*, our Supreme Court stated, "[w]e ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions." 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

#### B. Analysis

During closing argument, defense counsel stated, "Fairley belatedly comes up with might have heard something, don't know who said it. We certainly give that enough weight to be convinced beyond a reasonable doubt that there was an attempt at a robbery." Defendant asserts that "[w]ith one sentence, trial counsel admitted the State proved the attempted robbery, the only basis for the felony murder."

Defendant cites *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), and argues:

[w]hen counsel admits his client's guilt without first obtaining the client's consent,

the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent.

An "admission of the defendant's guilt during the closing arguments to the jury is a per se prejudicial error." *Id.* at 177, 337 S.E.2d at 505.

Defense counsel questioned Fairley's credibility and believability throughout his closing argument. He argued the following to the jury: (1) Fairley testified under oath she did not know Hammond kept illegal drugs in his house, yet she pled guilty to maintaining a dwelling house for keeping controlled substances; (2) "[Fairley] contradicts Roderick Hammond about the shots that were fired;" (3) "[Fairley] said, 'I might have heard something about 'give it up, man.' That's what she said on the stand. And she wasn't sure, might have heard something like that;" (4) when Fairley recounted the details of what happened to the assistant district attorney, the day after the shootings, she failed to mention she heard the words, "give it up;" and (5) "Credibility? Believability? Are we anywhere yet?"

After reviewing the entirety of trial counsel's closing argument, it is evident he was attempting to convince the jury Fairley was not a credible witness. Trial counsel argued:

First you must find beyond a reasonable doubt that the defendant attempted to commit armed robbery in that room and that, while attempting to commit armed robbery, he killed David Blue. More simple. That's more simple.

What's the problem with that? Nothing that Roderick Hammond says established that there

was any attempt to commit a robbery. The only thing that he says is he saw a gun and we started struggling over it. Nothing was said about give me your drugs, give me your money.

*[Fairley] belatedly comes up with might have heard something, don't know who said it. We certainly give that enough weight to be convinced beyond a reasonable doubt that there was an attempt at a robbery.*

(Emphasis supplied).

Given the entirety of the closing argument, it is apparent that this final sentence was a rhetorical device not intended to concede guilt, but rather to support a not guilty verdict.

Defendant also contends his trial counsel provided him ineffective assistance when he argued to the jury:

You need evidence which persuades you beyond a reasonable doubt. *Nobody - nobody in this courtroom knows what shot killed David Blue. Nobody in this courtroom knows what was going on when the shot was fired that killed David Blue. Nobody knows that. We can't speculate, we can't guess, we can't theorize. It's a bad thing he died, so let's just make a guess and send him off for the rest of his life for that. You can't do that.*

(Emphasis supplied).

Defendant asserts "[t]his was especially a problem since his client had taken the stand and told the jury what was going on when the shot was fired; he was struggling over a gun with Hammond." Defendant also argues, "it appears as though [defendant] is not to be believed by his own attorney."

Trial counsel argued the State's failure to meet its burden to prove how Blue was killed and urged the jury not to speculate how Blue was killed. Trial counsel was not questioning defendant's



credibility; rather, he was arguing, consistent with his defense theory, the jury should find defendant not guilty. Trial counsel zealously advocated for defendant and used trial tactics that we will not second-guess. *Lowery*, 318 N.C. at 68, 347 S.E.2d at 739.

Defendant fails to prove trial counsel's assistance was deficient. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Trial counsel did not admit "defendant's guilt during closing arguments to the jury." *Harbison*, 315 N.C. at 177, 337 S.E.2d at 505. Trial counsel urged the jury to find Fairley's testimony incredible and argued the State failed to meet its burden to prove who shot Blue. Viewed in the context of the entire closing argument, trial counsel's statements provided defendant with assistance "within the boundaries of acceptable professional conduct." *Roache*, 358 N.C. at 280, 595 S.E.2d at 406. This assignment of error is overruled.

#### IV. Cruel and Unusual Punishment

Defendant argues the jury did not find an intent to kill, and without such a finding, the imposition of life without parole constitutes cruel and unusual punishment. We disagree.

##### A. Standard of Review

"The Eighth Amendment, which forbids cruel and unusual punishments, contains a narrow proportionality principle that applies to noncapital sentences." *Ewing v. California*, 538 U.S. 11, 20, 155 L. Ed. 2d 108, 117 (2003) (internal quotations and citations omitted).

We noted that this Court has on occasion stated that the Eighth Amendment prohibits

imposition of a sentence that is grossly disproportionate to the severity of the crime. *But outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.* Although we stated that the proportionality principle would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment, we held that the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments.

*Id.* at 21, 155 L. Ed. 2d at 117 (internal quotations and citations omitted) (emphasis supplied).

#### B. Analysis

Defendant cites no authority in support of this contention. Defendant concedes "this Court and our State Supreme Court, [have] held that the felony murder rule was promulgated to deter even accidental killings from occurring during the commission of a dangerous felony." See *State v. Richardson*, 341 N.C. 658, 670, 462 S.E.2d 492, 500 (1995) ("Felony murder, by its definition, does not require intent to kill as an element that must be satisfied for a conviction."). The jury was not required to find that defendant intended to kill Blue.

N.C. Gen. Stat. § 14-17 (2005) provides:

A murder which shall be perpetrated by means of . . . or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole.

(Emphasis supplied).

"North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense." *State v. Stinnett*, 129 N.C. App. 192, 200, 497 S.E.2d 696, 701, *disc. rev. denied*, 348 N.C. 508, 510 S.E.2d 669, *cert. denied*, 525 U.S. 1008, 142 L. Ed. 2d 436 (1998). A punishment of life imprisonment without parole is consistent with N.C. Gen. Stat. § 14-17 and does not violate the Eighth Amendment. This assignment of error has no merit and is dismissed.

#### V. Legislative Branch

Defendant argues the mandatory imposition of a sentence of life without parole without proof of an intentional killing is an impermissible intrusion by the legislative branch upon the authority of the judicial branch to determine the appropriate sentence for the crime and the offender. Defendant cites no authority whatsoever to support this argument.

Defendant concedes "decisions of our appellate courts are contrary to this assertion. It has been held that the General Assembly alone prescribes the maximum and minimum punishments which can be imposed on those found guilty of crimes." See *State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986) ("It is well settled that the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes. The legislature alone can prescribe the

punishment for those crimes." ). This assignment of error is also utterly without merit and is dismissed.

VI. Conclusion

Defendant was not deprived of his right to effective assistance of counsel. Defense counsel zealously advocated for defendant and argued the State's witnesses and lack of proof on the killer of Blue to the jury.

Defendant's sentence of life imprisonment without parole does not constitute cruel and unusual punishment and is not an impermissible intrusion by the legislative branch upon the authority of the judicial branch. *Id.* Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued. We find no error in the judgment and sentence imposed.

No Error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).