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NO. COA05-1060

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v. New Hanover County
No. 02 CRS 21547

JOHN BRANDON HERRING

Appeal by defendant from judgment entered 3 September 2004 by Judge Jerry Braswell in New Hanover County Superior Court. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

Sue Genrich Berry for the defendant-appellant.

STEELMAN, Judge.

Defendant, John Brandon Herring, appeals his conviction for second-degree murder. For the reasons discussed herein, we find no error.

The evidence presented at trial tended to show the following: Defendant had been in a relationship in Texas with Kasey Fagan-Mock (Kasey), the half sister of defendant's ex-wife. Kasey moved to Wilmington where she lived by herself. Jared Grooms, a friend of Kasey's, introduced her to Geoff Edwards, the deceased. She began having a relationship with Edwards. Defendant moved from Texas to live with Kasey in Wilmington. Although Kasey and defendant were living together, she continued to have a relationship with Edwards.

Defendant was aware of her involvement with Edwards.

On 14 October 2002, Edwards had a party at his apartment, which defendant attended. Defendant and Edwards had a verbal confrontation. Defendant asked Kasey to leave with him, but she refused. Later that night, Grooms and Kasey went back to her apartment where they found defendant sitting on the couch. Defendant discussed with Kasey whether he should remain in Wilmington or return to Texas. Grooms left the apartment as their discussion concerning Kasey's relationship with Edwards became heated. Shortly thereafter, a witness heard a car alarm go off. The witness saw defendant acting in an aggressive manner towards Kasey and beating the hood of his car.

On 17 October 2002, Grooms went to Kasey's apartment where defendant later joined them. The three went out to dinner. As they returned to Kasey's apartment, they passed Edwards walking along the sidewalk. Kasey stopped the car and observed that Edwards was highly intoxicated. Grooms invited Edwards to his apartment. When Edwards failed to appear, Grooms went outside and saw him talking to Kasey in the doorway of her apartment. Edwards left and went to a party at a neighbor's residence. Defendant also went to the neighbor's party, where he spoke briefly with Edwards. Defendant left the party and went back to Kasey's apartment, where he, Kasey, and Grooms consumed beer.

About twenty minutes later, Edwards arrived at Kasey's apartment and also consumed beer. Soon after his arrival, he began to act in a boisterous and angry manner. Grooms asked Edwards to

leave on several occasions, but Edwards refused. Kasey and defendant did not participate in this dispute.

Edwards shoved Grooms and challenged him to a fight. Defendant left the front room of the apartment and went to a back bedroom. Grooms separated himself from Edwards and sat down on the couch. In the back bedroom, defendant located and loaded his pistol, and entered the front room brandishing it. At the time defendant entered the room, the confrontation between Grooms and Edwards had ended. Grooms was sitting on the couch, packing a pipe with marijuana. Defendant pointed the gun at Edwards from across the room and demanded he leave. Edwards had no weapon, nor did he threaten defendant with the use of one. Edwards balled his fists and moved towards defendant. Defendant shot twice, hitting Edwards once in the chest and once in the shoulder, causing internal injuries resulting in Edward's death. At the time of the shooting defendant was not intoxicated and was larger in stature than Edwards.

The jury found defendant guilty of second-degree murder. The trial court sentenced defendant to 144 to 182 months active imprisonment. Defendant appeals.

We initially note defendant expressly abandoned his second, third, and seventh assignments of error; therefore, we need not address them. N.C. R. App. P. 28(b)(6).

In his first argument, defendant contends the trial court erred in denying his motion *in limine* in which he requested that the trial court prohibit the State from introducing evidence that

defendant was previously married to Kasey's half-sister. We disagree.

The trial court denied the motion *in limine* prior to the commencement of the trial. Defendant did not object to the introduction of this evidence at trial. "[A] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (citations and internal quotation marks omitted). Rulings on motions *in limine* are preliminary in nature and subject to change at trial depending on the evidence offered. *T & T Dev. Co. v. S. Nat'l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49 (1997). "'[T]hus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.'" *Id.* at 602, 481 S.E.2d at 349 (citations omitted).

We note that the General Assembly amended Rule 103 of the North Carolina Rules of Evidence to eliminate the requirement that an objection to evidence be renewed at trial. 2003 N.C. Sess. Laws ch. 101. However, in *State v. Tutt*, this Court held this amendment to Rule 103 was unconstitutional. ___ N.C. App. ___, ___, 615 S.E.2d 688, 692-93 (2005). The defendant in *Tutt* did not appeal or seek review of this decision to the Supreme Court; therefore, this panel is bound by that holding. *In the matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Regardless, even assuming defendant properly preserved this matter for appellate review, he has failed to demonstrate that a reasonable possibility exists that "had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2006). This argument is without merit.

In his fourth argument, defendant contends the trial court erred in overruling his objections to testimony that defendant struck his vehicle during an argument with Kasey three days before shooting Edwards. We disagree.

Our standard of review for evidentiary rulings is abuse of discretion. *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74 (2002). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2006). This rule as a general rule of inclusion, not exclusion. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Relevant evidence of other crimes, wrongs, or acts by a defendant is admissible unless "its

only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id*.

Defendant argues this evidence does not shed light on motive and its only use was to show his propensity for violence. After review, we hold the trial court did not abuse its discretion in allowing this testimony into evidence for the purpose of showing motive. The record clearly shows Grooms testified that defendant was "very angry" and "very upset" during a heated exchange with Kasey concerning her relationship with the deceased and this exchange occurred immediately prior to defendant pounding on the hood of his vehicle. The trial court's ruling that this evidence shows motive in a "love triangle case" is not manifestly unsupported by reason. This argument is without merit.

In his fifth argument, defendant contends the trial court erred in overruling his objection to a "bolstering question" the prosecutor asked its witness, Grooms. We disagree.

As a general rule, a proponent is prohibited from bolstering a witness whose credibility has not been attacked. *See State v. Burge*, 100 N.C. App. 671, 674, 397 S.E.2d 760, 761 (1990). Rule 608 of the Rules of Evidence provides that the credibility of a witness may be supported, but only after the witness' character for truthfulness has been attacked. N.C. Gen. Stat. § 8C-1, Rule 608(a) (2006).

In the instant case, after establishing the witness was a friend of the deceased's family, the State in its direct

examination asked: "Would you, in any way, color or shade your testimony to try to help out this family?" Even assuming *arguendo*, that this constituted a bolstering question and was improper under Rule 608, "any error in admitting evidence in violation of Rule 608 does not require a new trial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *State v. Moore*, 103 N.C. App. 87, 99, 404 S.E.2d 695, 702 (1991) (citations and internal quotation marks omitted). Here, defendant has failed to show he has been prejudiced by the admission of this testimony. This argument is without merit.

In his sixth argument, defendant contends the trial court erred in permitting the State's witness, Grooms, to give a lay opinion as to whether he thought the situation demanded defendant's use of a deadly weapon. We disagree.

"'Whether a lay witness may testify as to an opinion is reviewed for abuse of discretion.'" *State v. Thorne*, ___ N.C. App. ___, ___, 618 S.E.2d 790, 795 (2005) (citations omitted). Lay opinion testimony is "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2006). Additionally, Rule 704 states that "testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704 (2006).

At trial, defendant asserted he acted in self-defense. Grooms personally observed the altercation between defendant and Edwards and defendant's use of deadly force. His testimony was helpful to the jury in determining a fact in issue, specifically whether it was necessary for defendant to use deadly force in defense of himself. Thus, the trial court did not abuse its discretion in allowing this testimony into evidence. This argument is without merit.

In his eighth argument, defendant contends the trial court erred in sustaining the State's objection to a question addressed to Kasey, which sought her lay opinion of defendant's state of mind.

"'The emotion displayed by a person on a given occasion is a proper subject for opinion testimony by a non-expert witness.'" *State v. Brown*, 312 N.C. 237, 243, 321 S.E.2d 856, 860 (1984) (citations omitted). *See also State v. Fullwood*, 343 N.C. 725, 736, 472 S.E.2d 883, 899 (1996); N.C. Gen. Stat. § 8C-1, Rule 701 (2006) (providing lay witness may give testimony regarding the emotional state of another).

In this case, the witness, Kasey, provided foundation testimony showing her opinion was based upon her own first-hand perception of the defendant's behavior. Kasey testified she was at the apartment the night of the shooting and observed defendant's behavior and demeanor. Thus, the trial court erred in sustaining the State's objection to her testifying whether she believed defendant was scared since such testimony was admissible as a

shorthand statement of fact based upon her present sense impressions or perceptions. *Accord Brown*, 312 N.C. at 243, 321 S.E.2d at 860 (citing 1 Brandis on North Carolina Evidence § 129 (2d rev. ed. 1982) and cases cited therein).

Nevertheless, even though the statement should have been admitted, defendant was not prejudiced because this evidence was merely corroborative of his own testimony concerning how he felt on the night of the shooting. *See State v. Hames*, 170 N.C. App. 312, 317-18, 612 S.E.2d 408, 411-12 (2005). This argument is without merit.

In his ninth argument, defendant contends the cumulative effect of the trial court's evidentiary rulings denied him a fair trial. We disagree.

The cumulative effect of erroneously admitted evidence may deprive a defendant of the fundamental right to a fair trial. *State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992). However, in order to show prejudicial error occurred entitling defendant to a new trial, "defendant must show a reasonable possibility that had the error not been committed, a different result would have been reached at trial." *State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300-01 (1996) (citing N.C. Gen. Stat. § 15A-1443(a)). After reviewing the record, we conclude no reasonable possibility exists that absent these asserted errors, standing alone or cumulatively, the outcome of the trial would have been different. This argument is without merit.

In his tenth argument, defendant contends the trial court

erred in overruling his objection to the prosecutor's closing argument regarding the duty to retreat from one's home. We disagree.

Defendant timely objected to the State's argument. Thus, our standard of review is whether the trial court's overruling the objection to the prosecution's argument was an abuse of discretion. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). The trial court will be deemed to have abused its discretion if the ruling is such that it could not be the result of a reasoned decision. *Id.* Such is the case where defendant can demonstrate: (1) the prosecutor's closing remarks were improper, and (2) those remarks "were of such a magnitude that their inclusion prejudiced defendant." *Id.* When determining whether a prosecutor's remarks were improper, the comments should not be viewed in isolation, but in "the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Augustine*, 359 N.C. 709, 725-726, 616 S.E.2d 515, 528 (2005) (citations and internal quotation marks omitted).

During closing argument, defendant argued that under "the law of North Carolina, you have the right to defend yourself. You have the right to defend other people. You have the right to defend yourself in your own home, and you have no duty to retreat from it, no duty at all." In responding to this argument, the prosecutor argued "it's a bridge too far to say that we're talking about a duty to retreat here. Duty to retreat means if someone breaks into your house while your (sic) asleep, you don't have to go running."

"Counsel is allowed wide latitude in the argument of hotly contested cases." *State v. Robinson*, 346 N.C. 586, 606, 488 S.E.2d 174, 187 (1997). In addition, a prosecutor may respond to the arguments made by defense counsel. *State v. Perdue,* 320 N.C. 51, 62, 357 S.E.2d 345, 352 (1987). Nevertheless, "[i]ncorrect statements of law in closing arguments are improper . . . ." *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995).

In the instant case, although the prosecutor's brief comment might not have precisely stated the black letter law to which he was referring, his remarks were not prejudicial in light of the trial court's subsequent correct instruction on self-defense. *See State v. Byrd*, 60 N.C. App. 624, 631, 300 S.E.2d 49, 53-54 (holding prosecutor's technical misstatement of the law was not prejudicial in light of the trial judge's subsequent correct instruction), *rev'd on other grounds*, 309 N.C. 132, 305 S.E.2d 724 (1983). This argument is without merit.

In his eleventh argument, defendant contends the trial court erred as a matter of law by denying his motion for a mistrial when it required the jury to deliberate for an unreasonable length of time in violation of N.C. Gen. Stat. §§ 15A-1061 and 1235(c). We disagree.

N.C. Gen. Stat. § 15A-1061 (2006) provides that a mistrial should be declared "upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen.

Stat. § 15A-1235(c) (2006) provides that the trial court "may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." "'[T]he decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion.'" *State v. Scott*, 150 N.C. App. 442, 450, 564 S.E.2d 285, 292 (2002) (citations omitted). The trial court will be deemed to have abused its discretion in failing to grant a mistrial "'only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (citations omitted).

On Friday, 3 September 2004, the trial court concluded the jury charge conference. That same day counsel commenced their closing arguments to the jury at 11:44 a.m. At 12:46 p.m. the judge recessed court for lunch and closing arguments resumed at 2:05 p.m. Following the trial court's charge to the jury, the verdict sheet was delivered to the jury at 3:34 p.m. and the jury began its deliberations. At 4:05 p.m. the jury requested a written copy of the court's charge and at 6:05 p.m. they requested reinstruction on second-degree murder and voluntary manslaughter. At 8:45 p.m., the trial court ordered the bailiff to return the jury to the courtroom. When the bailiff went for the jury, the foreperson requested an additional three minutes, indicating the jury was close to a verdict. Prior to the jury returning their verdict, defense stated: "Request a mistrial, and that kind of thing, because they requested food and they've been in there

continuously." The trial court denied the motion. At 8:53 p.m., the jury returned to the courtroom and pronounced its verdict of guilty of second-degree murder.

Defendant contends it was not reasonable for the jury to be in the deliberation room from 2:05 p.m. until nearly 9:00 p.m. without food or the opportunity to communicate with family members, and this demonstrates that the trial court "coerced" a guilty verdict. We first note that the record is devoid of any indication that the jury requested either food or an opportunity to communicate during its deliberations. The only communications from the jury documented in the record were for a copy of the instructions and for reinstruction on second-degree murder and voluntary manslaughter. Further, when the court sent for the jury at 8:45 p.m., it was the jury that requested additional time in order to reach its verdict.

Defendant has failed to demonstrate that the verdict was in any manner coerced by the trial judge or that the trial judge abused his discretion in denying defendant's motion for a mistrial. This argument is without merit.

NO ERROR.

Judges LEVINSON and JACKSON concur.

Report per Rule 30(e).