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NO. COA05-1303

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v.

Guilford County
No. 04 CRS 77618

JOSEPH DARRELL KERSEY

Appeal by defendant from judgment filed 12 April 2005 by Judge Christopher M. Collier in Guilford County Superior Court. Heard in the Court of Appeals 13 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

James M. Bell, for defendant-appellant.

STEELMAN, Judge.

Defendant confessed to shooting Valerie Baker (Baker) five times on 18 April 2004. Baker died of the gunshot wounds, and defendant subsequently stuffed her body in a 55 gallon barrel, which he kept outside near his garage. Defendant's daughter-in-law, Teresa Kersey (Teresa), contacted the High Point Police Department on 26 April 2004, and informed Detective James O'Connor that defendant had admitted to shooting Baker, and that Baker's body was at his house. Teresa also told Detective O'Connor that defendant came to her house a few days after the shooting and asked

her if he could put Baker's body in the well in front of Teresa's house.

The following day, 27 April 2004, Detective O'Connor and Detective Mark B. McNeill went to defendant's house. Detective O'Connor told defendant that Baker had been reported missing, and asked him if he knew where she was. Defendant said he did not know where Baker was, and gave the detectives consent to search his house. Detective O'Connor noticed a handgun protruding from defendant's back right pocket. Detective O'Connor stopped defendant, removed the handgun, and retained it for officer safety. The detectives did not see anything suspicious in the house, and after returning defendant's gun to him, they left. The following morning, 28 April 2004, Teresa made another call to Detective O'Connor and told him defendant had again contacted her, asking for help in disposing of Baker's body. Teresa informed Detective O'Connor that Baker's body was in a large barrel beside defendant's garage.

Detective O'Connor returned to defendant's house with Detective McNeill and other law enforcement officers. After Detective O'Connor noticed a 55 gallon barrel beside defendant's garage, Detectives O'Connor and McNeill approached defendant's house and rang his doorbell. Defendant answered, and Detective O'Connor again took possession of the handgun defendant was carrying. They asked permission to search defendant's property, and defendant consented. Detective O'Connor walked directly to the 55 gallon barrel he had seen earlier, and found Baker's body.

Defendant was arrested, and he informed the police that he wanted them to retrieve a note and an audio tape from inside his garage, which they did. In the note, defendant confessed to shooting Baker, but claimed it was done in self-defense. The tape contained abusive phone messages allegedly made by Baker and directed at defendant. Detective McNeill then obtained a search warrant for defendant's property, and the property was searched. Detective O'Connor testified that he began informing defendant of his Miranda rights, but that defendant interrupted him and said "This is a waste of time. You know I shot her. I shot her. I did it in self-defense." Detective O'Connor further testified that defendant told him Baker had attacked him, and that is why he shot her. He pointed out some injuries to his head and body that were allegedly received in the attack, and Detective O'Connor had these injuries photographed. Defendant informed Detective O'Connor that the gun he had assumed custody of that morning was the weapon defendant had used to shoot Baker.

Defendant went to trial on a charge of first-degree murder at the 21 March 2005 Criminal Session of Guilford County Superior Court. Defendant testified at trial, and admitted the shooting, but claimed it was done in self defense. According to defendant's testimony, Baker, who was around forty years younger than defendant, had lived with him for a brief period in 2002, and had continued to spend time at his house since then. Defendant testified that he loved Baker, and would sometimes give her money, but that she had a drug and alcohol problem which could make her

abusive. Defendant obtained a restraining order against Baker in early 2004, but she continued to spend time at defendant's house, apparently with defendant's consent. Baker spent the night before her death at defendant's house. Defendant testified that the following morning, 18 April 2004, he noticed both Baker and his car were gone. Defendant called the police to report his car stolen. Later that day, police located Baker and defendant's car, which defendant recovered. Defendant testified that as a result of his call to the police, Baker was charged with felony possession of a stolen vehicle.

According to defendant, at around 9:30 that night, Baker called defendant and began cursing at him, and threatened to kill him. At approximately 11:00 p.m. that night, defendant heard someone banging on his back door. It was Baker, who, according to defendant, pushed through the door, knocking him up against the wall. Defendant testified that she was drunk and acting "crazy". After defendant told Baker that he was not going to give her any money, she attempted to take money from defendant's pocket by force. Baker then assaulted defendant with full beer bottles, a dining room chair, a soap dish, and her fists. Defendant alleged that Baker threatened to kill him by kicking him in his pacemaker. Defendant testified that as he was on the floor following this assault, Baker returned to the refrigerator for a new bottle of beer. She came at him again, holding the beer bottle in a threatening manner, and that is when he began shooting her. Defendant testified that he was afraid and "in a state of shock,"

and that is why he did not go to the police after he shot and killed Baker.

The trial court submitted to the jury the possible verdicts of guilty of first-degree murder, guilty of second-degree murder, guilty of voluntary manslaughter, or not guilty. They returned a verdict of guilty of voluntary manslaughter, and the trial court sentenced defendant to an active prison term of sixty-four to eighty-six months, with credit given for time served. From this judgment defendant appeals.

In defendant's first argument, he contends that the trial court erred by admitting into evidence the handgun used to shoot Baker because it was improperly seized. We disagree.

At the suppression hearing, both Detectives O'Connor and McNeill testified that defendant voluntarily handed the handgun over to them when asked to do so, and that defendant consented to their search of the property. They testified that they retained possession of the handgun while the search was conducted for officer safety purposes, and, for obvious reasons, retained possession after defendant was arrested for murder. The detectives' testimony was that the handgun was finally taken into official state custody pursuant to a search warrant issued following defendant's arrest.

Defendant argues that the handgun was improperly seized prior to the issuance of the search warrant, and therefore should have been suppressed. He further argues that there were no findings of fact made by the trial court specifically concerning the seizure of

the handgun, and therefore the trial court's denial of defendant's motion to suppress was a violation of his constitutional right against unreasonable searches and seizures.

Even assuming *arguendo* that defendant is correct in his argument, he does not contend in his brief that he was prejudiced in any manner by the admission of the handgun into evidence at trial, and we hold that any error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443 (2005). Defendant testified at trial that he shot Baker and killed her, but argued that the shooting was done in self-defense. In light of his admission that he shot and killed Baker, the admission of the handgun in no manner prejudiced defendant at trial. This argument is without merit.

In defendant's eighth argument, he contends that the trial court committed reversible error by refusing to admit an arrest warrant issued against Baker for the theft of defendant's car. We disagree.

Defendant testified at trial that Baker had taken his car without his permission, and that as a result she was charged with felony possession of a stolen vehicle. Defendant was shown a document which he verbally identified as a copy of an arrest warrant for Baker for stealing his car. The State objected when defendant attempted to introduce this warrant into evidence, and the objection was sustained. Defendant's daughter in law, Teresa, testified indicating that Baker had stolen defendant's car, and that "I was the one that had to take out the warrant on [Baker] because the vehicle was in my name."

"It is well settled in this jurisdiction that no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence." *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982). Assuming *arguendo* that the arrest warrant was erroneously excluded from evidence, in light of the testimony of both defendant and Teresa indicating that an arrest warrant was issued for taking defendant's automobile, defendant cannot show prejudice. This argument is without merit.

In defendant's ninth argument, he contends that the trial court committed reversible error by admitting testimony in violation of North Carolina Rules of Evidence Rule 403 indicating defendant had threatened to shoot Baker. We disagree.

Leslie Fuller, an acquaintance of defendant and Baker, testified that while she was at defendant's house around November or December of 2003 (four to five months before the shooting), defendant stated: "If she just keep [f***ing] with me, I'm going to shoot her between the eyes." Defendant objected to the question from the State eliciting this response on the grounds of leading and hearsay. The trial court overruled defendant's objection. Defendant never objected to Fuller's response, nor argued that this evidence should be excluded under Rule 403 because its "probative value is substantially outweighed by the danger of unfair prejudice[.]" Defendant has failed to preserve this issue for appeal. *State v. Joyner*, 167 N.C. App. 635, 638, 606 S.E.2d 196, 198 (2004); *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d

682, 685 (2002); *State v. McNeill*, 140 N.C. App. 450, 460, 537 S.E.2d 518, 524 (2000). This argument is without merit.

In defendant's eleventh argument, he contends that the trial court committed reversible error by instructing the jury on false, contradictory or conflicting statements by the defendant over his objection. We disagree.

Our Supreme Court has held that false, contradictory, or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate himself. The probative force of such evidence is that it tends to show consciousness of guilt. The instruction is proper not only where defendant's own statements contradict each other but also where defendant's statements flatly contradict the relevant evidence.

State v. Scercy, 159 N.C. App. 344, 353, 583 S.E.2d 339, 344 (2003).

In the instant case, there was ample evidence of statements made by defendant that contradicted other statements made by him, as well as statements that contradicted relevant evidence. *Id.* As an example, defendant stated to Detective O'Connor when first questioned by him that he did not know the whereabouts of Baker. At trial, defendant admitted to killing Baker and stuffing her body in a 55 gallon drum, which was sitting just outside defendant's garage when Detective O'Connor first inquired into Baker's whereabouts. This argument is without merit.

In defendant's twelfth argument, he contends that the trial court committed reversible error in failing to consider or find mitigating factors presented by defendant. We disagree.

Defendant was sentenced in the presumptive range for his conviction. The trial court is not obligated to find factors in mitigation unless it deviates from the presumptive range. *State v. Mack*, 161 N.C. App. 595, 606, 589 S.E.2d 168, 176 (2003). This argument is without merit.

In defendant's second, third, fourth, fifth, sixth and seventh arguments, he contends the trial court committed reversible error by admitting or refusing to admit certain items of evidence at trial. We disagree.

In order for evidentiary rulings to warrant a new trial, defendant must show that he was prejudiced thereby. "'A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial" N.C. Gen. Stat. § 15A-1443(a) (2001)." *State v. Locklear*, 159 N.C. App. 588, 595, 583 S.E.2d 726, 731 (2003). This is defendant's burden. *State v. Moore*, 107 N.C. App. 388, 395, 420 S.E.2d 691, 696 (1992). Defendant has failed to argue that any of the evidentiary rulings of the trial court created a reasonable possibility of a different result at trial. Thus, even assuming *arguendo* the trial court committed error, defendant has failed in his burden to show he was prejudiced thereby to an extent warranting a new trial. *Id.* These arguments are without merit.

Because defendant has not argued his other assignment of error in his brief, it is deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2005).

NO PREJUDICIAL ERROR.

Judges McCULLOUGH and CALABRIA concur.

Report per Rule 30(e).