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NO. COA05-1327

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Edgecombe County
No. 03CRS053759

TERRY LEE THORNE

Appeal by defendant from judgment entered 4 January 2005 by Judge Frank R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 10 May 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John P. Scherer II, for the State.

D. Tucker Charns for defendant-appellant.

HUNTER, Judge.

Terry Lee Thorne ("defendant") appeals from judgment entered 4 January 2005 consistent with a jury verdict finding him guilty of voluntary manslaughter. For the reasons stated herein, we find no error.

The State's evidence tended to show that in the early morning hours of 3 November 2003, Willie Mae Battle ("Battle"), a cashier working at EP Mart #2 ("EP Mart"), observed a man, later identified as defendant, and another man, later identified as the victim, Dennis Lloyd ("Lloyd"), cross Raleigh Street from the Eckerd's drugstore and enter the EP Mart parking lot. Battle testified that

it appeared defendant was being followed by Lloyd, and defendant bent over as if to catch his breath after reaching the pumps outside the EP Mart. Lloyd caught up to defendant and the two had a conversation which Battle could not hear. They then moved in front of the store window and Battle observed Lloyd swing a piece of wire at defendant, who ducked and avoided the wire. Defendant then ran across the street to the Hardee's parking lot with Lloyd in pursuit. From approximately seventy feet away, Battle observed defendant stop beneath a parking lot light and pick up what Battle believed to be a piece of metal from nearby bushes, which defendant then threw at Lloyd, who stood approximately ten to fifteen steps away from defendant. Defendant then crossed the street again and headed towards Eckerd's. Lloyd followed defendant. Battle did not see defendant again.

Battle testified that shortly thereafter, Lloyd entered the EP Mart and fell against the cashier's cage glass, saying "help me, help me." Battle called 911 and observed that Lloyd had a spot on his chest and did not appear to have a weapon. The investigating officers discovered a broken hard plastic sign stained with blood in the Hardee's parking lot and an old coat hanger in the Eckerd's parking lot. Defendant's fingerprints matched those on the broken sign found in the Hardee's parking lot.

Defendant waived his Miranda rights and agreed to answer questions about the incident. Defendant initially told the investigating officer that he was walking home from a girl's house when an unknown man asked him for change. Defendant stated that

Lloyd snatched $10.00 from him when defendant pulled out his money, but when defendant started to "jump" Lloyd, Lloyd acted as though he was going to pull a gun and defendant fled. Defendant told officers that as he ran towards the EP Mart, Lloyd hit him with a pole. Defendant stated that he gestured to the woman in the store to call for help, then crossed the street again with Lloyd still chasing him. Defendant told officers he picked up a piece of metal from the bushes and hit Lloyd, who dropped a putty knife, which defendant picked up and used to stab Lloyd. Defendant stated that Lloyd continued to pursue him, and he finally escaped by jumping a fence. The investigating officers' search of the area did not reveal a pole, gun, or putty knife.

In a subsequent interview, when questioned as to why Lloyd chased him, defendant told the investigating officer that he had sold Lloyd a "blinker," a fake piece of cocaine, for $20.00, and Lloyd had wanted a refund. Defendant later admitted that he owned the knife he used to stab Lloyd and had it in his back pocket at the time of the incident. The knife was retrieved with defendant's permission from his home.

Lloyd was taken to the emergency room of Nash General Hospital, where he died. An autopsy revealed the cause of death as loss of blood from a stab wound in Lloyd's left side.

Defendant testified at trial that on the night of the incident, he was approached by a man who asked if he "ha[d] anything." The man then asked if he had change, and when defendant pulled out his money to count it, Lloyd snatched it. Defendant

started towards Lloyd, but stepped back after observing Lloyd put his hand under his shirt as though he had a gun. Defendant testified that he then ran, pursued by Lloyd, and was afraid of being shot. He testified that when he asked Lloyd why he was chasing him, Lloyd responded that he planned to kill him.

Defendant testified that Lloyd chased him around a parked car in a KFC parking lot several times. Defendant observed that Lloyd had a bicycle seat pole in his hands, which he threw at defendant as they neared the EP Mart. When defendant stopped to catch his breath in the EP Mart parking lot, Lloyd swung and hit him in the chest with the pole. Defendant again ran with Lloyd in pursuit.

Defendant testified he recalled that he had a pocket knife in his back pocket, and pulled it out and opened it as he crossed the street to a Hardee's restaurant, fearing for his life. He then grabbed the sign from the bushes in the Hardee's parking lot and slung the sign towards Lloyd. Defendant testified that Lloyd grabbed him with his left hand and swung at him with a weapon in his right hand twice, hitting defendant once. Defendant stated he then swung the knife out of fear and ran. Lloyd continued to pursue him, but tripped on a curb, allowing defendant to climb a fence and escape.

Defendant admitted under cross-examination that he had not mentioned in his statements to police that the man had asked for change for $50.00, that Lloyd had reached for a gun or put his hand under his shirt, that he ran to keep from being shot, that he ran around a car several times, that Lloyd told him he was going to

kill him, that he had been scared or afraid, or anything about a bicycle seat. Defendant also admitted that the "pipe" was the wire hanger found in the parking lot.

Defendant was convicted of voluntary manslaughter, and was sentenced to 103 to 133 months. Defendant appeals from his judgment and conviction.

I.

Defendant first contends that his trial counsel's failure to request recordation of the jury *voir dire*, opening, and closing statements constituted ineffective assistance of counsel. We disagree.

The standard for assessing ineffective assistance of counsel, conduct below an objective standard of reasonableness, is well established. *See State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 247-48 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

N.C. Gen. Stat. § 15A-1241(a) (2005) governs recording of criminal proceedings in superior court. The statute requires recordation of all proceedings except jury selection in non-capital cases, opening and closing statements, and arguments of counsel on questions of law. *Id.* In *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990), our Supreme Court found that the defendant failed to establish ineffective assistance for failure to request recordation of the jury selection and bench conferences when no specific allegations of error were made and no attempts were made to reconstruct the transcript. *Id.* at 661-62, 392 S.E.2d at 373.

Here, as in *Hardison*, defendant argues only that the failure to request recordation of the jury selection and opening and closing arguments "prevented appellate counsel from fully defending this appeal." Defendant assigns no error to the jury selection process and has made no attempt to reconstruct the record as to the opening and closing arguments. Defendant also makes no specific allegations as to errors in the opening and closing arguments. As in *Hardison*, we conclude that these arguments "fall far short of satisfying the burden set forth in *Strickland*[.]" *Id.* at 662, 392 S.E.2d at 373. Defendant's assignment of error is overruled.

II.

Defendant next contends in a related assignment of error that the trial court's failure to *sua sponte* order recordation of the jury *voir dire*, opening, and closing statements deprived defendant of meaningful appellate review and effective assistance of appellate counsel. We disagree.

In *State v. Price*, 170 N.C. App. 57, 67, 611 S.E.2d 891, 898 (2005), this Court recently held that our case law does not support the argument that the trial court must ensure recordation of those items specifically exempted by statute from the record, and the defendant cannot show prejudice from the failure to do so.

Here, defendant makes no specific allegations that there were errors in the jury selection or opening and closing statements. As defendant cannot show prejudice from the trial court's failure to *sua sponte* require recordation of the jury selection or opening and closing statements, this assignment of error is overruled.

III.

Defendant next contends that the trial court erred in denying defendant's motion to dismiss the charge of voluntary manslaughter. We disagree.

The standard of review for a motion to dismiss for insufficient evidence is well established. *See State v. Jackson*, 145 N.C. App. 86, 89, 550 S.E.2d 225, 229 (2001) (holding that the trial court is required to interpret the evidence in the light most favorable to the State in determining the sufficiency of the evidence).

Defendant contends that the State failed to show that defendant did not act in perfect self-defense, specifically that defendant had a reasonable belief in the necessity to kill Lloyd, that he was not the aggressor, and that he did not use excessive force. A killing is excused, if done in perfect self-defense, which consists of the following four elements:

> "'(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be

> necessary under the circumstances to protect himself from death or great bodily harm.'"

State v. Blackwell, 163 N.C. App. 12, 17, 592 S.E.2d 701, 705 (citations omitted), *cert. denied*, 358 N.C. 378, 597 S.E.2d 768 (2004). "Voluntary manslaughter occurs when one kills intentionally, but does so in the heat of passion aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor." *State v. Lassiter*, 160 N.C. App. 443, 454, 586 S.E.2d 488, 497, *disc. review denied*, 357 N.C. 660, 590 S.E.2d 853 (2003).

Here, the State presented evidence that defendant did not have a reasonable belief in the need to kill Lloyd. The State presented evidence that defendant passed several businesses from which he could have sought help while fleeing from Lloyd. Further, there was no evidence that Lloyd was armed with anything other than a coat hanger. Lloyd's pursuit of defendant in a public area with nothing more than a coat hanger establishes a reasonable inference under the circumstances that defendant lacked a reasonable belief in the need to kill Lloyd. Further, although defendant's use of a sign to halt Lloyd's pursuit may have been proportionate under the circumstances, the State's evidence that defendant stabbed Lloyd in the chest with a knife provides a reasonable inference that defendant used more force than was reasonably necessary to defend himself against a man armed with a coat hanger. As the State presented sufficient evidence of the elements of manslaughter to reach the jury, the trial court did not err in denying defendant's motion. This assignment of error is overruled.

IV.

Defendant finally contends the trial court erred in determining defendant's sentence without a proper stipulation by defendant. We disagree.

N.C. Gen. Stat. § 15A-1340.14(f) (2005) sets out acceptable methods of proof of prior convictions.

> (f) Proof of Prior Convictions. -- A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

Id. Here, the State presented evidence in the form of a stipulation by the parties. The record specifically shows that defendant's attorney stated he had reviewed the sentencing worksheet and gone through the prior record information, and stipulated that defendant had a prior record level of three. Defendant incorrectly contends that the statute requires a showing that "defendant understood what it meant to stipulate to that conviction." Accordingly, this assignment of error is without merit.

Defendant fails to show that non-recordation of the jury selection, opening, and closing statements was ineffective

assistance of counsel or error on the part of the trial court. The trial court further did not err in denying defendant’s motion to dismiss for insufficient evidence, or in determining defendant’s prior record level based on stipulation by defendant’s counsel. We find no error in defendant’s trial.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).