NO. COA05-1547

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Guilford County
No. 03 CRS 097521

DAYTON WAYNE PITTER

Appeal by defendant from judgment entered 17 March 2005 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

CALABRIA, Judge.

Dayton Wayne Pitter ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of first-degree murder. We find no prejudicial error.

At trial in Guilford County Superior Court, the State presented the following evidence: on 14 September 2003, at approximately 1:30 a.m., Bruce Lamont Meadows ("Mr. Meadows"), the victim, entered a residence at 629 Watson Street, Greensboro, North

Carolina. Shortly after entering the residence, Mr. Meadows was shot and killed.

Joshua Sumner ("Mr. Sumner"), an informant to Officer T.A. Griffiths ("Officer Griffiths") of the Greensboro Police Department, testified that he knew defendant because he had purchased drugs from defendant on several occasions. Mr. Sumner also testified that he gave defendant's cell phone number to Officer Griffiths during September 2003 and informed Officer Griffiths of defendant's whereabouts. Mr. Sumner testified that the day before Mr. Meadows was killed, defendant approached Mr. Sumner and his brother and told them about a phone call defendant had received from Officer Griffiths. Defendant questioned Mr. Sumner asking him if he knew how Officer Griffiths had obtained defendant's cell phone number. Mr. Sumner testified that defendant indicated he thought either Mr. Sumner, Mr. Sumner's wife, or Mr. Meadows had given his number to Officer Griffiths. Mr. Sumner further testified that during their conversation, defendant pulled a gun out of his pocket. While holding the gun, defendant told Mr. Sumner that if he discovered who was responsible for giving Officer Griffiths his cell phone number, he would kill that person. Mr. Sumner denied any knowledge of how Officer Griffiths obtained defendant's number.

Cameron D. Stevens Sumner ("Mrs. Sumner"), Mr. Meadows's cousin, testified that on 14 September 2003 at approximately 12:00 a.m., she, Mr. Meadows, and Lamar Rashaad Johnson ("Johnson") were driving to her mother's house when Mr. Meadows asked to stop at 629

Watson Street. Upon their arrival, Mrs. Sumner and Mr. Meadows got out of the car to go into the residence while Johnson remained in the car. As they walked towards the door, Mrs. Sumner stopped to put on her shoes. Mr. Meadows continued towards the door and entered the front door of the residence. Before Mrs. Sumner was able to enter the residence, the door was closed behind Mr. Meadows. As Mrs. Sumner approached to open the door, she heard the sound of a gunshot. She quickly opened the door and as she did, she saw Mr. Meadows stumble to the side, fall backwards against the wall, and slide to the floor.

Clifton Pratt ("Pratt"), an eyewitness, testified that on 14 September 2003 he went to 629 Watson Street to buy drugs from the defendant. Pratt testified that he was sitting on a couch in the living room when Mr. Meadows entered the residence. Mr. Meadows approached defendant, whose back was towards him, and said that he needed to purchase an "eight ball" of cocaine. Pratt testified that defendant reached his hand into his pocket to grab his gun. When the door closed behind Mr. Meadows, defendant spun around, pulled out the gun, pointed it at Mr. Meadows and said, "I ought to kill [you] right now." Pratt testified that Mr. Meadows responded by asking, "For what?" In an attempt to exit the residence, Pratt stood up and ran towards the door. As Pratt slipped past Mr. Meadows, defendant pulled the trigger on the gun and shot Mr. Meadows.

Kevin Lee Matthews ("Matthews"), another eyewitness, testified that at the time of the incident he lived at 629 Watson

Street and that he allowed defendant to use his house to sell drugs. On 14 September 2003, Matthews was standing in front of the residence when Mr. Meadows arrived. While Mrs. Sumner and Johnson remained outside, Matthews followed Mr. Meadows inside and closed the door. Matthews testified that he proceeded to the stairway to go upstairs when he heard defendant talking to Mr. Meadows. Mr. Meadows responded to defendant by asking, "[w]hat are you talking about?" Matthews further testified that defendant answered Mr. Meadows and said, "I'm going to show you what I'm talking about," pulled out a gun, and shot Mr. Meadows.

Finally, the State also presented testimony from Keana Benton ("Benton"), defendant's girlfriend, that on 14 September 2003, defendant admitted to her that he had shot someone. The defendant presented no evidence at his trial for first-degree murder.

The jury returned a verdict finding defendant guilty of first-degree murder. The trial court subsequently sentenced defendant to life imprisonment without parole. Defendant appeals.

The sole issue on appeal is whether the trial court erred by informing the jury of defendant's possible sentence term if he was convicted of second-degree murder. We find no prejudicial error.

During jury deliberations, the bailiff delivered a handwritten note from the jury to the judge which read:

> Judge Balog,
> What is the mandatory sentence for 2nd degree murder?

In response to the jury's question, the judge informed the jury of the range of sentences the defendant would possibly face if

convicted of second-degree murder. Defendant argues the trial court erred by informing the jury of defendant's possible sentences.

The State contends that if there was any error in the trial court's instruction to the jury, the defendant invited the error or, in the alternative, that by failing to object to the jury instruction, the defendant failed to preserve any such error for appeal. After reviewing the applicable portion of the transcript, we disagree with the State and we hold that defendant's counsel did not invite error and sufficiently complied with N.C. R. App. P. 10(b)(2) (2005).

Defendant initially objected to the trial court informing the jury of the specific sentence as the following discussion illustrates:

> MR. KIMEL (the defense attorney): Would the Court read the question just one more time? I'm sorry.
>
> THE COURT: Yes, Sir [sic]. "What is the mandatory sentence for second degree murder?"
>
> MR. KIMEL: Your Honor, I've never heard that question before, you know, from a jury. We would request that the Court merely say sentencing is in the discretion of the Court.

Subsequently the trial judge asked the State's response.

> THE COURT: What says the State?
>
> MR. FREE: I think, Your Honor, that borrowing on that - I think I caught the last bit of what Mr. Kimel said. I think the Court should just instruct them - caution them that you are responsible for sentencing in reference to if they come back with the second degree, that that's not their function. Their function is only to determine the facts and render [a]

> decision [of] guilty on the charge, on whatever charge. Guilty on first, second, or not guilty. I'm just a little concerned if giving them the numbers and then they can in weighing the numbers at that time.

Defendant's attorney reiterated that he agreed with the State and objected to the use of numbers in the judge's answer to the jury. Because defendant consistently objected to including a specific sentence range in the answer to the jury's question, defendant's subsequent suggestion to the judge did not invite error. Further, because defendant requested a different instruction, defendant was not required to object to the instruction when given in order to preserve this question for appeal. *See State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984) (holding defendant's earlier request for instruction was sufficient to preserve issue for appeal even though defendant did not object to the jury charge when given).

We next consider whether the trial court erred in its response to the jury's question.

Generally "[t]he judge should not . . . instruct the jury with regard to possible punishments for lesser included offenses of the capital crime for which defendant is being tried, at least when punishment for such offenses is not mandatory but subject to the exercise of the judge's discretion." *State v. Anderson*, 303 N.C. 185, 201, 278 S.E.2d 238, 247 (1981), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). "If information is requested [the trial judge] should refuse it and explain to [the jury] that punishment is totally irrelevant to the

issue of guilt or innocence." *State v. Rhodes*, 275 N.C. 584, 592, 169 S.E.2d 846, 851 (1969). Because the sentence at issue was a discretionary sentence, the general rule that the trial court should ordinarily not provide the jury with the possible sentence range is applicable. *See Anderson,* 303 N.C. 185, 201, 278 S.E.2d 238, 247. Thus, under the general rule, the trial court should have refused to provide the jury with any specific information regarding the sentence and instead should have stated "punishment is totally irrelevant to the issue of guilt or innocence." *Rhodes*, 275 N.C. at 592, 169 S.E.2d at 851.

The State argues that the "even keel" exception to the general rule should apply because (1) defendant's argument to the jury was that the State's witnesses were too unreliable to support a life sentence; and (2) defendant's counsel argued the seriousness of the mandatory sentence for first-degree murder leaving a question in the mind of the jury as to the seriousness of the second-degree murder charge. We disagree.

Under *Rhodes*, the "even keel" exception applies when there is some compelling reason such as an erroneous impression given by defense counsel "which makes disclosure as to punishment necessary in order to keep the trial on an even keel and to insure complete fairness to all parties." *Id.*, 275 N.C. at 592, 169 S.E.2d at 851 (internal quotations omitted). This exception, however, does not prevent a defendant's counsel from arguing possible sentences to the jury. Pursuant to North Carolina General Statute § 7A-97

(2005), "the whole case as well of law as of fact may be argued to the jury." In interpreting this statute, this Court has held:

> Counsel may exercise this right by reading the punishment provisions of the statute to the jury, though he may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the prescribed punishment. . . . Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely.

State v. Belfield, 144 N.C. App. 320, 327, 548 S.E.2d 549, 552-53 (2001) (internal quotations and citations omitted). This provision "secures to a defendant the right to have the jury informed of the punishment prescribed for the offenses for which the defendant is being tried." *State v. Peoples*, 141 N.C. App. 115, 120, 539 S.E.2d 25, 30 (2000). By counsel providing a jury with sentencing information "[i]n serious felony cases . . . [it] serves the salutary purpose of impressing upon the jury the gravity of its duty." *State v. McMorris*, 290 N.C. 286, 288, 225 S.E.2d 553, 554 (1976). Thus, "[i]t is proper for [a] defendant to urge upon the jury the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration." *Id.*

In this case, the arguments made to the jury by defendant's counsel were proper. Defendant's counsel did not attack the validity, constitutionality, or propriety of the punishment; neither did defendant's counsel argue that the punishment was too severe and encourage the jury to acquit. *See Belfield,* 144 N.C.

App. at 327, 548 S.E.2d at 552-53. *See also, State v. Smith,* 335 N.C. 539, 438 S.E.2d 719 (1994) (holding that argument of defendant's counsel was not improper because it impressed upon the jury the seriousness of the matter). Further, defendant's counsel did not make "disclosure necessary to remove an erroneous impression and to place the cause back on an even keel so that it might be decided by the jury with complete fairness to all parties." *Rhodes*, 275 N.C. at 588, 169 S.E.2d at 849. Therefore the "even keel" exception does not apply in the case before us. It was error for the trial court to inform the jury of defendant's possible sentence if he were convicted of second-degree murder.

We next consider whether the trial court's error was prejudicial. *Rhodes*, 275 N.C. at 592, 169 S.E.2d at 851 (holding when a trial court improperly tells a jury of the defendant's sentence ranges, "the error will be evaluated like any other.").

Defendant argues that the error in this case was prejudicial because it probably prevented the jury from finding him guilty of second-degree murder because the jury may have concluded that the sentence for second-degree murder would be an inadequate punishment. We disagree.

North Carolina General Statutes § 15A-1443 (2005) states:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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 out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant . . . .

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Jones*, 342 N.C. 628, 630, 467 S.E.2d 233, 234 (1996). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.*, 335 N.C. at 635, 440 S.E.2d at 836. "Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Welch*, 135 N.C. App. 499, 502, 521 S.E.2d 266, 268 (1999). Second-degree murder is a lesser included offense of first-degree murder. *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 925 (2000).

The State's evidence tended to show that defendant approached at least one person prior to the shooting and stated that he was going to kill whoever had given his cell phone number to Officer Griffiths. Also defendant stated that he suspected three people, one of whom was Mr. Meadows, had given his cell phone number to Officer Griffiths. Defendant approached the other two people about the phone number and both of then denied giving the number to Officer Griffiths. Eyewitnesses stated that on 14 September 2003, when Mr. Meadows entered the residence, the defendant's back was

towards Mr. Meadows. One witness testified that defendant had a look on his face like "something was about to go down." Witnesses testified that defendant reached into his pocket to pull out a gun and, once the door closed behind Mr. Meadows, the defendant spun around and pointed the gun at Mr. Meadows. Defendant argued briefly with Mr. Meadows while pointing the gun at him, then shot him. The State's evidence established defendant's premeditation and deliberation. Given the overwhelming amount of evidence establishing each element of first-degree murder, there is no indication that the jury would have reached a different verdict had the error not been committed. We hold defendant was not prejudiced by the trial court informing the jury of the sentence ranges for second-degree murder. *See Rhodes*, 275 N.C. at 592, 169 S.E.2d at 851 (1969) (holding no prejudicial error resulted when the trial court informed the jury of the punishment for a conviction of assault with intent to commit rape when the evidence presented established beyond a reasonable doubt a rape occurred). Defendant failed to argue his remaining assignments of error. Therefore, they are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006).

No prejudicial error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).