

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-807

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 03 CRS 56036
03 CRS 56364

BOBBY LEON GRIFFIN,
Defendant.

Appeal by defendant from judgments entered 25 January 2005 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 7 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

GEER, Judge.

Defendant Bobby Leon Griffin appeals from his convictions for first degree murder and making a false bomb report. Defendant argues primarily that the trial court erred by excluding evidence and arguments about defendant's mental illness and voluntary intoxication, as these two defenses tend to negate the element of specific intent. We need not, however, reach the merits of defendant's arguments since the jury convicted him of first degree murder based on lying in wait – a theory that does not require the State to prove specific intent.

Facts and Procedural History

In February 2003, defendant and his wife were living at 2804 Barker Court, Winston-Salem, North Carolina. Defendant had been unemployed since March 2002, when he had left his job at the North Carolina Department of Corrections. Defendant had married his wife, Mary Stephens, in July 2002. Ms. Stephens, a social worker in the Guilford County Mental Health System, testified that the couple's practice was for defendant to make mortgage payments and pay the household bills out of his own, separate bank account.

At some point after the marriage, defendant stopped making mortgage payments on the house. A foreclosure sale was eventually held, and the only bid was placed by Frank Lama. Lama and his business partner, Ruben Sanchez, were in the business of purchasing foreclosed homes and fixing them up for resale. After purchasing defendant's home, Lama attempted to arrange a lease with defendant so that defendant could continue living in the house. Because defendant missed his appointment to sign the lease and paid no rent, Lama and Sanchez instituted eviction proceedings. Ms. Stephens had no knowledge of any of these events.

The eviction was set for 2 June 2003 at 11:45 a.m. On that morning, defendant drove his wife to work. Later, he called a former co-worker, Shirley Gibson, at work, told her that he was calling to say goodbye, and explained that his home was about to be foreclosed and he was contemplating suicide.

At 11:45 a.m., Lama and Sanchez, together with Deputy Sheriff Victoria Hodge of the Forsyth County Sheriff's Department, met at defendant's house. Hodge and Lama climbed the steps to the porch,

while Sanchez waited on the lawn. In response to Hodge's ringing the doorbell, defendant opened the door and pointed a gun in Hodge's face. Hodge pushed the gun to one side and yelled to Lama and Sanchez to run. As Hodge was drawing her own weapon, defendant began to fire his gun. Sanchez and Hodge ran in different directions away from the house, but Lama was shot in his head and spine and died almost immediately on the front porch.

Hodge radioed for backup. As police pulled into Barker Court, defendant walked onto the front lawn of the house and shot himself in the face. He remained conscious, however, and told officers that "the house was going to blow." He added, "I did what I meant to do, I did what I done." Officers at the scene described defendant as very calm and normal and his speech unslurred.

Defendant was taken to the police station, where his blood alcohol level was determined to be .19. He told police that he had received a notice of the eviction in the mail and had gotten "ready"; that he had done "what [he] set out to do"; and that he had shot Lama, watched him fall, and then shot him again. He also told police that he had no regrets for what he had done and that he was angry that Deputy Hodge had run away instead of shooting back at defendant.

Defendant continued to maintain that there was a bomb in the house. When defendant's wife arrived at the police station later in the day, defendant initially told her that the house was rigged with a bomb and that she should not go in. After she began crying hysterically, defendant admitted that there was no bomb.

Defendant was indicted on one count of first degree murder, one count of felonious assault with a firearm on a government official, and one count of communicating a false bomb report. He was tried non-capitally, and, on 25 January 2005, a jury convicted him of all three charges. The jury found defendant guilty of first degree murder based on three different theories: murder by lying in wait; felony murder based on the assault charge; and murder with malice, premeditation, and deliberation.

The trial court sentenced defendant to life imprisonment without parole for the murder conviction followed by a consecutive sentence of six to eight months for the false bomb report conviction. The court arrested judgment on the conviction for felonious assault on a government officer because it was the felony that formed the basis for defendant's felony murder conviction. Defendant timely appealed.

Discussion

Defendant's first arguments on appeal all relate to whether defendant had the capacity to form the specific intent to commit first degree murder. He contends that (1) the trial court improperly excluded his wife's testimony about a hospitalization of defendant and defendant's possible post traumatic stress syndrome from service in the Vietnam War; and (2) the trial court should have allowed defense counsel to discuss, during closing arguments, defendant's alcohol consumption on the morning of the murder. Defendant contends that his wife's testimony and the fact of his alcohol consumption would have permitted the jury to conclude that

the State had failed to prove that defendant had the specific intent to commit first degree murder.

The jury, however, convicted defendant of first degree murder under three separate theories: malice, premeditation, and deliberation; felony murder; and murder by lying in wait. Although, generally, "[s]pecific intent to kill is an essential element of first degree murder" *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (quoting *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838-39 (1981)), murder perpetrated by lying in wait is not a specific intent crime.¹ As our Supreme Court has explained, "[p]remeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill. The presence or absence of these elements is irrelevant." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320, cert. denied, 498 U.S. 871, 112 L. Ed. 2d 155, 111 S. Ct. 192 (1990).

In this case, even if we were to hold that the wife's testimony and counsel's argument as to intoxication should have been allowed, defendant's first degree murder conviction and sentence would still stand based on the lying in wait verdict. Accordingly, any error resulting from the exclusion of evidence or arguments tending to negate defendant's specific intent is

¹"Lying in wait" refers to "a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979).

harmless.² See *State v. Harris*, 338 N.C. 211, 224-25, 449 S.E.2d 462, 468 (1994) (holding that defendant had failed to show prejudice from trial court's exclusion of a psychologist's testimony, since the testimony only addressed the issue "whether defendant could have formed the intent to kill, whether defendant could premeditate and deliberate, and whether defendant could act with malice," and therefore the "diagnosis could have had no effect on the finding of first-degree murder by lying in wait since a defense of lack of mental capacity does not apply to lying in wait"); *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992) ("Because voluntary intoxication may only be considered as a defense to specific intent crimes, it is . . . irrelevant to a charge of first-degree murder by lying in wait, a crime that does not require a finding of specific intent." (internal citations omitted)).

Defendant also argues that the trial court erred in denying his request to submit the lesser included offense of second degree murder to the jury. "Second-degree murder is a lesser included offense of first-degree premeditated and deliberate murder; it lacks the elements of premeditation and deliberation." *State v. Britt*, 132 N.C. App. 173, 178, 510 S.E.2d 683, 687, *disc. review denied*, 350 N.C. 838, 538 S.E.2d 571 (1999). Our Supreme Court has held, however, that when a defendant is convicted of felony murder,

²We note that defendant does not argue on appeal that he lacked the capacity to form the intent necessary to make a false bomb report, a specific intent crime, but rather limits his arguments to the first degree murder charge.

any error in failing to instruct as to second degree murder is harmless if there was no evidence on which defendant could have been acquitted of felony murder while being found guilty of second degree murder. See *State v. Robinson*, 342 N.C. 74, 81, 463 S.E.2d 218, 222 (1995) (holding that any error trial court committed in failing to instruct jury on second degree murder did not entitle defendant to a new trial, since jury found defendant guilty of felony murder based on his pleading guilty to kidnaping, robbery, and felonious larceny), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793, 116 S. Ct. 1693 (1996); *State v. Williams*, 343 N.C. 345, 363-64, 471 S.E.2d 379, 389 (1996) (because there was no evidence that defendant did not participate in the underlying felony of theft of victim's car and personal property, defendant not entitled to instruction on second degree murder), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618, 117 S. Ct. 695 (1997).

Here, it was undisputed that defendant committed the felony of assault with a deadly weapon upon a government officer and that, in the course of this felony, he shot and killed Lama. Because no reasonable construction of the facts presented at trial would have allowed the jury to acquit defendant of felony murder while convicting him of second degree murder – an intentional killing without malice, premeditation, or deliberation – defendant was not entitled to an instruction on second degree murder. Therefore, this assignment of error is overruled.

No error.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).