NO. COA05-888

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Montgomery County
No. 01 CRS 050642

DAVID ALAN RITTER

Appeal by defendant from judgment entered 28 February 2005 by Judge Steve Balog in Montgomery County Superior Court. Heard in the Court of Appeals 8 May 2006.

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

Clifford, Clendenin, O'Hale & Jones, LLP, by Walter L. Jones, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from the judgment entered upon his conviction by a jury of second degree murder.

The State's evidence at trial tended to show that on 7 March 2001, patrolman Brandon Davis of the Biscoe Police Department received a call from his dispatcher reporting a disturbance at 501 Tommy Street. Upon arriving at the scene, he discovered a person later identified as the victim, Johnny Ray Quick, lying on the ground, bleeding and unresponsive. Attempts to revive Quick were unsuccessful.

Warren Ray Cagle testified that he was with Quick at the dead end of Leach Street in Biscoe in the early morning hours of 7 March 2001. Quick was attempting to sell an unloaded .32 caliber pistol, which Cagle identified as State's exhibit number four. Cagle testified that while they were standing together, a truck drove down the street, turned around, and came to where they were standing. Defendant got out of the truck and approached Cagle and Quick, attempting to sell them a gun, which Cagle identified as State's exhibit number five. Cagle and defendant discussed whether the gun was loaded and defendant removed the bullets. Defendant and Quick then walked away from Cagle.

In a little while, Cagle noticed the truck drive down the road and stop at the entrance to the trailer park. Shortly thereafter, Cagle heard four shots. He thought they were test-firing the gun. On cross-examination, Cagle explained that he and Quick "looked out for each other," that he was going to help Quick sell the gun, and that the gunshots did not alarm him because he "took for granted" that Quick and defendant knew each other, and that Quick was going to help defendant sell his gun. He did not observe any tension between Quick and defendant, despite the fact that they each had a gun to sell.

Timothy Martin testified that on the night in question Quick was attempting to sell an unloaded pistol. Martin told Quick that if he did not have any bullets, no one was going to buy a pistol that could not be test fired. He further testified that he was smoking crack on the evening in question; he recalled hearing

gunshots. However, that was not an uncommon occurrence. Martin did not recall the statement he made to police that night.

Billy Simmons testified that he saw defendant with Quick, and defendant approached him and inquired if he knew anyone who wanted to purchase a gun. Simmons responded, "No," and as he walked off Simmons overheard defendant say to Quick "something like you M-F, you sh***ed me." Simmons further testified that defendant was acting high, and crazy, and that he was gesticulating with the gun. He explained he heard defendant "screaming you M-F, you sh***ed me, you sh***ed me" but did not hear Quick respond. Simmons identified State's exhibit number five as the gun defendant attempted to sell him. Simmons recognized the gun as one that defendant had occasionally pawned with his friend, "Goat." On cross-examination, Simmons testified that defendant had purchased drugs from him, as did defendant's friend, Jeremy Freeman.

Jeremy Freeman testified pursuant to a plea agreement. He explained that he, defendant, and Raymond Goforth were hanging out at a pool hall on 7 March 2001, when defendant wanted to leave and "get rid of" his pistol. Because Goforth did not want to drive his Toyota, they drove Freeman's pick-up truck. He let defendant out at the turnaround spot on Leach Street, defendant approached a crowd "of like three guys" and Freeman drove around the block. When Freeman returned, he saw defendant coming towards him up the street with a black male. The black male had his hands in his coat, walking three or four feet behind defendant. Defendant turned around and pulled his gun out of his waistband or his

pocket, and the black male "started to take off running, and [defendant] fired one shot, and I don't know if it hit him in the back or whatever."

Freeman further testified that defendant chased the black male around to the edge of the house, and then he heard defendant "empty the revolver", firing five more shots. Freeman then drove defendant home and Freeman saw Quick's weapon in defendant's possession. Arriving at defendant's house, Goforth advised defendant not to tell his mother what had happened, and left to go home, taking State's exhibit five, which Freeman acknowledged belonged to Goforth, with him. Freeman spent the night at defendant's house and returned home the next morning.

On 8 March 2001, Freeman gave a statement to police, omitting the information about what he had witnessed in an attempt to protect defendant. Despite the fact that Goforth's gun had been used, he did not tell the police of Goforth's presence because he "didn't think [Goforth] really had anything to do with it. He was just with us." Freeman explained that he revised his statement to give more details about what happened after consulting his father. The revised statement included the fact that Goforth had been with them and that Freeman had witnessed defendant shoot the victim.

On cross-examination, Freeman revealed that he had been friends with defendant, who was friends with Goforth. He acknowledged that he knew the gun was Goforth's and that he knew defendant had taken it from Goforth, pawned it and bought it back a few days before 7 March. On the evening of 6 March, Goforth gave

defendant the gun, with the understanding that defendant was going to sell it again to the person from whom he had re-purchased it a few days earlier. Goforth was supposed to receive the proceeds of the sale. Freeman further explained that in his revised statement to police, he had stated that when defendant got back in the car defendant said "that guy shouldn't have pulled a gun on him." Freeman testified that he asked defendant if he had shot the victim, and defendant replied, "yeah, he shouldn't have pulled a gun on me." Defendant then said "let's get out of here quick." As they drove away, defendant repeated his assertions that Quick pulled a gun on him. Upon arrival at defendant's residence, Freeman asked defendant if he shot the guy, "and he said yeah. . . . He said he shouldn't have pulled on him." Freeman said "I hate you done that" to which defendant responded, "He shouldn't have pulled a gun on me."

Freeman also was examined regarding the details of a third statement to police, made on 16 April 2001, where he recounted that the black male following defendant turned around as if to avoid getting shot, and began to run away from defendant, who fired one shot at the black male before pursuing him as he fled.

Special Agent Kathryn Brannan, an expert in latent prints and fingerprint identification, testified that there were no latent fingerprints found on State's exhibit five. Special Agent Neal Morin testified that he examined State's exhibit five and compared test bullets to bullet fragments recovered from the autopsy performed on Quick's body. He determined that the fragments had

come from State's exhibit five. Forensic Pathologist Dr. R.L. Thompson testified that multiple gunshot wounds caused Quick's death. Defendant presented no evidence.

During the charge conference, defendant requested an instruction on voluntary manslaughter, in addition to first and second degree murder. The trial court denied the request and instructed the jury on first degree murder and second degree murder. After deliberating for approximately forty-five minutes, the jury requested a copy of the jury charge, the photos, and the maps in evidence. The trial court denied the request for a written copy of the charge, offering instead to re-charge the jury, and permitted the exhibits to be sent into the jury room. Half an hour later, the jury requested a written copy of the charges, and to hear the jury instructions again. The trial court agreed to provide a written copy of the offenses and then re-instructed the jury. The jury was dismissed for the day without reaching a verdict.

The following day, the jury resumed deliberations, and then queried the trial court, "Could the defense have called a witness in this case other than the Defendant?" The trial court indicated to the parties that he intended to answer the question "yes". Defense counsel requested that the trial court additionally instruct that defendant "doesn't have any duty to put on witnesses and that the decision not to put on witnesses can't be held against him." The trial court denied this request and answered the question accordingly. The jury continued their deliberations,

querying the trial court several times regarding matters not raised in this appeal. Prior to their weekend recess, the jury informed the trial court that it could not reach a unanimous verdict. The trial court instructed the jurors that it was their duty to reach a verdict and to "reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions. But that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of fellow jurors or for the mere purpose of reaching a verdict." After fifteen more minutes of deliberation, the court released the jury for a weekend recess. On Monday morning, the jury requested the transcripts of Freeman's testimony, and the trial court played back the tape of Freeman's testimony for the jury. The jury then continued its deliberations. After an additional question not brought forth on appeal, the jury again resumed deliberations. At 3:45 p.m., the jury returned a verdict of guilty of second degree murder. Defendant was sentenced to imprisonment for a term of a minimum of two hundred and twenty months and a maximum of two hundred and seventy-three months. Defendant appeals.

On appeal defendant contends that the trial court committed reversible error by 1) refusing to instruct the jury on the lesser included offense of voluntary manslaughter and 2) failing to elaborate on its answer to the jury's question with respect to whether defendant could call witnesses. We have carefully

considered these arguments and for the reasons stated below, we find no prejudicial error in defendant's trial.

Defendant first argues that the trial court erred in its refusal to instruct the jury on voluntary manslaughter. "A defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support that lesser included offense." *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). If the State presents sufficient evidence "to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *Id.* at 267-68, 524 S.E.2d at 40. Unlawful killing "with malice but without premeditation and deliberation" is second degree murder. *State v. Durham*, ___ N.C. App. ___, ___, 625 S.E.2d 831, 835 (2006). In contrast, the lesser included offense of voluntary manslaughter is defined as "an intentional killing without premeditation, deliberation or malice . . . [either] in the heat of passion . . . or in the exercise of imperfect self-defense where excessive force under the circumstances was used." *State v. Lyons*, 340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995) (citation omitted).

Defendant maintains that Freeman's statements that defendant told him that the victim "shouldn't have pulled a gun on me" and his testimony that the victim was following defendant with his hands in his pockets amounted to sufficient evidence to require

that the trial court instruct on the lesser included offense. We disagree. There was no evidence of an altercation between defendant and Quick; rather, all the evidence indicates that they were acquaintances who completed a transaction. Since "[w]ords alone are never sufficient provocation to mitigate second degree murder to voluntary manslaughter," *Durham*, ___ N.C. App. at ___, 625 S.E.2d at 835, any provocative statements made by Quick as he followed defendant do not satisfy a heat of passion justification for the killing. *See id.* (noting that defendant not entitled to jury instruction on voluntary manslaughter based on heat of passion where a significant amount of time "elapsed between the earlier confrontation and the time of the shooting").

Freeman's testimony that Quick followed defendant with his hands in his pockets and defendant's statement to him that Quick "shouldn't have pulled a gun on me" likewise is insufficient to warrant the instruction due to imperfect self defense.

> Before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?

State v. Gillis, 158 N.C. App. 48, 59, 580 S.E.2d 32, 40 (*quoting Lyons*, 340 N.C. at 662, 459 S.E.2d at 778), *disc. review denied*, 357 N.C. 508, 587 S.E.2d 887 (2003).

This evidence does not tend to show that defendant formed a reasonable belief that it was necessary to kill Quick to protect himself from death or great bodily harm. *See Lyons*, 340 N.C. at

662, 459 S.E.2d at 778-79 (holding that defendant's evidence that he shot upon hearing loud knocks on his door and feared robbery insufficient to warrant instruction on voluntary manslaughter under a theory of self-defense). Moreover, the reputed statement by defendant that he acted in self-defense amounts to little more than a denial by defendant that he committed the offense, which does not entitle him to the instruction. *See Smith*, 351 N.C. at 268, 524 S.E.2d at 40. Accordingly, this assignment of error is overruled.

In his second argument, defendant contends the trial court erred in answering the jury's question regarding whether defendant could have called defense witnesses. Defendant contends that by simply answering the question, "yes" the trial court impermissibly commented on defendant's choice not to testify and improperly invited the jury to consider matters outside the record.

It is well settled that it is impermissible for the prosecutor, defense counsel, or trial court to comment on a defendant's failure to testify. *State v. Gregory*, 348 N.C. 203, 210, 499 S.E.2d 753, 758, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). Our Supreme Court, however, "has repeatedly held that a prosecutor may properly comment on a defendant's failure to produce witnesses or evidence that contradicts or refutes evidence presented by the State." *State v. Call*, 349 N.C. 382, 421-22, 508 S.E.2d 496, 520 (1998); *see also State v. Ward*, 354 N.C. 231, 251, 555 S.E.2d 251, 265 (2001) (noting that "a comment implicating a defendant's [Fifth Amendment] right to remain silent, although erroneous, is not invariably prejudicial").

The trial court properly instructed the jury on defendant's right not to testify and that the State bore the burden of proof. There were no comments made about defendant's failure to testify, nor did the prosecutor comment on the fact that he rested his case without putting on evidence. *Cf. State v. McCall*, 289 N.C. 570, 577-78, 223 S.E.2d 334, 337-38 (1976) (granting new trial where prosecutor cross-examined the defendant about his wife's failure to testify against him and the trial court failed to "promptly instruct the jury that the wife's failure to testify and the improper argument concerning that fact must be disregarded and under no circumstances used to the prejudice of the defendant"). We fail to see how the trial court's correct answer to the jury's question rises to the level of reversible error. We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges LEVINSON and JACKSON concur.

Report per Rule 30(e).