NO. COA06-1341

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

STATE OF NORTH CAROLINA

v. Cumberland County
No. 04 CRS 60478

JUDY BARNETT BETHEA

Appeal by defendant from judgment entered 20 March 2006 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 22 May 2007.

Attorney General Roy Cooper, Jr., Assistant Attorney General Alvin W. Keller, Jr., for the State.

Franklin E. Wells, Jr., for defendant-appellant.

CALABRIA, Judge.

Judy Barnett Bethea ("defendant") appeals from a judgment entered upon a jury verdict finding her guilty of voluntary manslaughter. We find no error.

In the early morning hours of 11 June 2004, defendant shot her husband, Exodus Cromwell Bethea ("the victim") during an argument. The victim's death resulted from a gunshot wound and ended a long and tumultuous relationship between defendant and the victim. Defendant and the victim began their relationship more than two decades before the incident. In 1978, defendant began working for

the victim as a prostitute in Fayetteville, North Carolina. Defendant continued to work for the victim for approximately three years until he became physically abusive. In 1981, defendant ended her relationship with the victim and moved to Virginia. In 1992, defendant moved back to North Carolina, married, obtained suitable employment, and served as a member of a political campaign.

In 2001, after her first marriage dissolved, defendant moved to Greensboro, North Carolina. While in Greensboro, defendant reestablished her friendship with Hattie Marie Council ("Ms. Council"), the victim's sister. Eventually, defendant moved back to Fayetteville, North Carolina and rekindled her relationship with the victim. Defendant lived with the victim's step-father, William Malloy ("Mr. Malloy") while the victim was completing a drug treatment program. After the victim graduated from the drug treatment program, defendant and the victim moved into an apartment and lived together. Defendant and the victim married in February 2003. However, before their marriage, defendant noticed a change in the victim's behavior and suspected that the victim had resumed using heroin.

In September 2003, when Protect America closed its office, the defendant was terminated from her job with them. After defendant's termination, the victim sold drugs and used the proceeds to pay their monthly bills. Tension between defendant and the victim rose because of financial difficulties. Also during this time, the victim began having an affair with a woman named Leslie Leyhew ("Ms. Leyhew"), one of the victim's frequent drug customers.

Approximately three weeks prior to the victim's death, Ms. Council, the victim's sister, began residing with defendant and the victim. Also during that time, Jeff Williams ("Mr. Williams") was residing with defendant and the victim. Mr. Williams and Ms. Council assisted the victim with his drug sales.

On 10 June 2004, the defendant planned to go to a comedy club with the victim. When she asked the victim if he was going to accompany her, the victim responded by addressing defendant in a derogatory manner and stating he was not going anywhere with her. Defendant dressed for the club, left her house, drove to her brother's house, and then drove to the club. After the comedy show ended, defendant left the club at approximately 1:00 a.m. As she was driving home, defendant attempted to call the victim to inform him that she would be home soon, but she was unable to reach him. When defendant arrived, the victim was not at home. Defendant testified that when she walked into her home, Ms. Council and Mr. Williams were sitting in the living room. Defendant asked Ms. Council if she knew where the victim had gone. Ms. Council responded that she was unaware of the victim's whereabouts. Defendant then went into her bedroom where she noticed that their cash box was open and two Viagra pills were missing. Defendant testified that at that point, she assumed the victim was with Ms. Leyhew. Defendant immediately left her home to find the victim.

The victim's cousin, Sandra Whittmore ("Ms. Whittmore"), testified that at approximately 2:00 a.m. on 11 June 2004, defendant arrived at her home in a state of hysteria looking for

the victim. Ms. Whittmore testified that defendant indicated that she assumed the victim was with Ms. Leyhew. Ms. Whittmore also testified that defendant pulled out a gun and said, "When I see him, I'm going to kill him." After defendant stormed out of her house, Ms. Whittmore called the victim to warn him and tell him what defendant had said.

Ms. Council testified that on the morning of 11 June 2004, Ms. Whittmore called her and said that defendant was looking for the victim and was threatening to kill him. Ms. Council stated that neither she nor Ms. Whittmore took defendant's threat seriously because, "she always said it." When defendant arrived home, Ms. Council was asleep in her bedroom. Ms. Council testified that she was not aware of what time either defendant or the victim returned home. Ms. Council did not hear the victim and defendant arguing and was only awakened when she heard "something go pop." Moments later, Ms. Council heard the victim calling her name, and she went into his bedroom. When Ms. Council walked into the room, she saw the victim lying on the bedroom floor and defendant standing by the bathroom door holding a gun. Ms. Council testified that she asked defendant what happened and defendant stated that she meant to shoot the victim in the leg but that "the gun went up and shot him in his stomach." Defendant testified that she arrived home at approximately 4:00 a.m. on 11 June 2004 and found the victim at their house. Defendant testified that she began to argue with the victim about where he had been that night and whether he wanted their relationship to continue. Defendant stated that at some

point during their argument, the victim pulled up his shirt to display a knife that he was carrying. At that point, defendant grabbed a gun and told the victim to "get away from me with that knife." Defendant testified that she pointed the gun at the victim to make him stay away from her and the gun fired. Defendant stated that she only intended to shoot the victim in the leg to "get him off of me."

Detective Paul Archambault ("Detective Archambault") interviewed defendant at the police station. Detective Archambault testified defendant stated during her interview that she was arguing with the victim and confronted him about a gun she found in the storage shed. After defendant confronted him, the victim picked up a knife and threatened defendant with it. Defendant stated that she picked up the gun, pointed it at the victim, told him to "stay back," and at that point, the gun discharged.

Defendant was charged with first-degree murder. On 28 March 2006, a jury returned a verdict finding defendant guilty of voluntary manslaughter. Cumberland County Superior Court Judge E. Lynn Johnson determined defendant's prior record level was a Level III and sentenced defendant to a minimum term of 92 months and a maximum term of 120 months in the North Carolina Department of Correction. No findings were made as to mitigating or aggravating circumstances since defendant was sentenced in the presumptive range. Defendant appeals.

I. The Victim's Criminal Record

Defendant argues the trial court erred by refusing to allow defendant to elicit testimony regarding the victim's prior criminal record. We disagree.

On cross-examination, defense counsel sought to elicit testimony from Ms. Council regarding the victim's criminal history. The trial court sustained the State's objection to defendant's question regarding whether the victim had been convicted of several felonies.

"While evidence of character is generally inadmissible, N.C. R. Evid. 404(a)(2) provides that evidence of pertinent character traits of a victim offered by an accused is admissible." *State v. Dewberry*, 166 N.C. App. 177, 184, 600 S.E.2d 866, 871 (2004) (citations and quotations omitted). "N.C. R. Evid. 405(b) allows for proof of character by evidence of specific instances of conduct in cases where character is an essential element of a charge, claim or defense." *Id.* "A defendant claiming self-defense may present evidence of the victim's character which tends to show (1) the victim was the aggressor, or (2) the defendant had a reasonable apprehension of death or bodily harm, or both." *State v. Brown*, 120 N.C. App. 276, 277, 462 S.E.2d 655, 656 (1995) (citations omitted).

In the case before us, the following exchange took place between defense counsel and Ms. Council during cross-examination:

> [DEFENSE COUNSEL]: Okay. Now, [the victim] was a convicted felon at the time he was shot?

[MS. COUNCIL]: Yes, sir.

[DEFENSE COUNSEL]: He had been convicted of felonies several times over?

[PROSECUTOR]: Objection.

[DEFENSE COUNSEL]: Had he been convicted of just one felony?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

Defendant did not seek to elicit testimony regarding specific instances of the victim's conduct that tended to show the victim's propensity for violence or that the victim was the aggressor. *See State v. Everett*, 178 N.C. App. 44, 630 S.E.2d 703 (2006), *affirmed*, 361 N.C. 217, 639 S.E.2d 442 (2007). The proffered question only sought to elicit evidence regarding the victim's criminal record in general. Further, the question regarding the victim's character did not tend to establish that defendant had a reasonable apprehension of bodily harm. Thus, the victim's character evidence was inadmissible, and the trial court did not err by sustaining the State's objection to defendant's question.

Furthermore, defendant failed to make an offer of proof regarding Ms. Council's response to the proffered question. "To prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content of the answer must be obvious from the context of the questioning." *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996). In this case, defendant did not make an offer of proof, and the contents of Ms. Council's response to the question are not obvious. Therefore, this assignment of error is overruled.

II. Testimony Regarding Defendant's Credibility

Defendant next argues the trial court committed plain error by allowing Detective Archambault to offer an opinion on defendant's credibility. We disagree.

On cross-examination, defense counsel questioned Detective Archambault regarding defendant's specific statements that he recorded in his investigative report during an interview with defendant. The following exchange took place:

> [Detective Archambault]: Ms. Bethea stated [the victim] went into the kitchen so she followed him. She said he told her, in quotations, you continue on and your life will be gone. Ms. Bethea's eyes went back and forth from left to right several times. Then she said, I found this gun yesterday in the gazebo after the kids put up the lawn mower. . . .
>
> [DEFENSE COUNSEL]: Okay. Now, when you're – when you're saying Ms. Bethea's eyes went back and forth from left to right several times, is that an observation of how she told the story to you or was it a demonstration as to how she was actually looking out of her perception?

> [Detective Archambault]: That's my perception of her. . . . And that's consistent, her eye movement, with someone that's not recalling memory. They're making new memory.

Because defendant failed to object at trial to Detective Archambault's response, this assignment of error is subject to plain error review. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). "Under plain error review the burden is on the defendant to show that absent the error the jury probably would have reached a different verdict." *State v. Couser*, 163 N.C. App. 727, 730, 594 S.E.2d 420, 423 (2004) (internal quotations omitted).

Defendant relies upon several cases in support of her argument that Detective Archambault's testimony was improper opinion testimony. *See generally State v. Delsanto,* 172 N.C. App. 42, 615 S.E.2d 870 (2005); *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004); *State v. Bush*, 164 N.C. App. 254, 595 S.E.2d 715 (2004). However, in each of these sexual abuse cases, an expert witness testified regarding whether there was evidence of sexual abuse and ultimately gave an opinion on the credibility of the prosecuting witness. Admission of the testimony was held to be in error not only because it was impermissible expert testimony regarding the credibility of the witness, but also because there was no independent evidence of sexual abuse apart from the expert witness' testimony.

The cases defendant relies upon are distinguishable from the case before us. Here, Detective Archambault was not tendered as an expert witness, and his testimony was not elicited to give an

opinion on defendant's credibility. Further, Detective Archambault's testimony was elicited by defense counsel on cross-examination and not by the State. During cross-examination, defense counsel asked Detective Archambault to explain whether his observation that "[defendant's] eyes went back and forth from left to right several times" was a description of defendant's conduct while she recounted the incident to him. The response he gave was his opinion regarding the meaning of defendant's conduct and not an opinion on defendant's credibility.

Further, assuming *arguendo* the admission of Detective Archambault's statement was error, defendant has failed to show that absent the error, the jury probably would have reached a different result. The State presented overwhelming evidence of defendant's guilt. During the hours leading up to the shooting, witnesses testified that defendant was carrying a gun while searching for the victim and indicated that she would shoot the victim if she caught him with that "white bitch." Also, on the night of the incident, defendant stated to at least one witness, "When I see him, I'm going to kill him." The State also presented evidence that defendant's relationship with the victim was not only violent and tumultuous, but that she had been involved in several physical altercations with the victim on previous occasions and, more importantly, was not afraid of the victim. Several witnesses testified defendant had stated on previous occasions that the victim was pushing her to the limit and that she was going to have to kill the victim. Defendant has not met her burden of showing

that absent any alleged error the jury would have reached a different result. Therefore, this assignment of error is overruled.

III. Testimony Regarding Use of Deadly Force

Defendant next argues the trial court erred by not allowing defendant to elicit testimony regarding when a police officer may appropriately use deadly force.

During cross-examination, defense counsel attempted to question Officer John Somerindyke ("Officer Somerindyke") as follows:

> [DEFENSE COUNSEL]: Now, if you were placed, hypothetically speaking, with your training, in a situation where you had a suspect --
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> [THE COURT]: He's not an expert witness, Mr. Bray.
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> [THE STATE]: Objection.
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> [THE COURT]: Sustained.
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> [DEFENSE COUNSEL]: Okay. If I may ask this, Your Honor and see. In your training in the academy, is there any general rules they establish for you as a police officer when to use the appropriate deadly force under certain circumstances?
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> [THE COURT]: Mr. Bray, that is taught as a law enforcement officer. The defendant nor the victim in this case occupied that profession. Sustained.

Defendant argues the testimony she sought to elicit from Officer Somerindyke was relevant to the issue of self-defense and whether she acted reasonably by using deadly force.

At trial, defendant asserted the affirmative defense of self-defense. The elements of self-defense require a showing that:

> (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. Wallace, 309 N.C. 141, 147, 305 S.E.2d 548, 552 (1983).

"Evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, among other things, the danger of unfair prejudice." *State v. Wallace*, 104 N.C. App. 498, 501-02, 410 S.E.2d 226, 228 (1991). Relevant evidence is defined as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). A trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403. *Wallace*, 104 N.C. App.

at 502, 410 S.E.2d at 228. However, such rulings are given great deference on appeal. *Id.*

We agree that the testimony defendant sought to elicit from Officer Somerindyke was relevant to the issue of whether defendant's use of deadly force was reasonable under the circumstances. However, when relevant evidence is erroneously excluded by the trial court, the defendant bears the burden of showing that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C. Gen. Stat. § 15A-1443(a) (2005). Defendant has failed to meet her burden.

The State presented evidence of defendant's tumultuous relationship with the victim through several witnesses who testified that defendant was often subjected to physical abuse by the victim. Also, defendant testified on her own behalf regarding her relationship with the victim and emphasized that although the victim had physically threatened her on several occasions, he had never threatened her with a knife. Defendant also testified regarding the events surrounding the shooting. She presented evidence that on the night of the shooting, she and the victim were involved in a heated argument and that the victim threatened her with a knife. During her testimony, defendant demonstrated the distance between herself and the victim when he approached her with the knife and she shot him. Defendant also reiterated that she only pointed the gun at the victim because she feared for her life since the victim had "never drawed [sic] a knife on me before" and

she wanted the victim to "get away from me." Defendant presented sufficient evidence for the jury to determine whether her use of force was reasonable. Defendant has not demonstrated that her testimony alone was insufficient to allow the jury to determine whether she acted under a reasonable apprehension of danger. Although Officer Somerindyke's testimony may have been relevant, defendant has not met her burden of showing that there is a reasonable possibility the jury would have reached a different result if the testimony was not excluded. Therefore, this assignment of error is overruled.

IV. Mitigating Circumstances

Finally, defendant argues the trial court erred at sentencing in failing to find the existence of mitigating circumstances despite sufficient evidence presented to support mitigating factors. However, defendant concedes this Court has rejected this argument in *State v. Mack*, 161 N.C. App. 595, 589 S.E.2d 168 (2003). "The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." N.C. Gen. Stat. § 15A-1340.16(c) (2005). Defendant was sentenced in the presumptive range and concedes that this Court has rejected this argument in *Mack*. Therefore, this assignment of error is dismissed.

The record includes additional assignments of error defendant has not addressed. Pursuant to N.C. R. App. P. 28(b)(6) (2005), they are deemed abandoned. Accordingly, we find no error.

No error.

Judges WYNN and TYSON concur.

Report per Rule 30(e).