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NO. COA06-1384

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2007

STATE OF NORTH CAROLINA,
Plaintiff,

v. Bertie County
No. 01CRS050603

DENNIE LEE CHERRY, JR.,
Defendant.

Court of Appeals

Appeal by defendant from judgment entered 16 March 2006 by Judge Cy A. Grant, Sr., in Superior Court, Bertie County. Heard in the Court of Appeals 26 April 2007.

Slip Opinion

Attorney General Roy A. Cooper, III, by Assistant Attorney General C. Norman Young, Jr. for the State.

Glenn Gerding for defendant-appellant.

STROUD, Judge.

Defendant Dennie Lee Cherry, Jr., appeals from judgment entered pursuant to conviction for first-degree murder in Bertie County Superior Court. Defendant contends that he is entitled to a new trial, because the trial court erred by: (1) denying defendant's request to represent himself, (2) allowing Special Agent Jennifer Elwell to testify as an expert, (3) allowing the State to present evidence that defendant had been convicted in 2000 of assaulting the victim with a deadly weapon inflicting serious injury, (4) allowing the State to present evidence that defendant

shot the victim in 1977, and (5) denying defendant's motion to dismiss the charge of first-degree murder on the grounds of insufficient evidence to sustain a conviction. Upon careful review of the record and defendant's assignments of error, we disagree, and conclude defendant received a fair trial, free of plain or prejudicial error.

I. Background

On 16 November 1999, defendant fired a shotgun at his wife, Mrs. Shirley Cherry ("victim"), hitting her in the side. As a result, he was convicted on 3 February 2000 of assault with a deadly weapon inflicting serious injury and placed on probation. He violated his probation, and began serving an active sentence on 2 October 2000. On 20 June 2001, while serving his sentence, defendant was assigned to a Department of Corrections ("DOC") work crew picking up trash at a local high school. While purportedly taking a bathroom break, defendant left the work crew and went to the home he had shared with his wife. Defendant entered the home, leaving his DOC work crew shirt and hat beside the steps.

A search for defendant led law enforcement officers to the home. The house was surrounded, and no one entered or left thereafter. Around 5:00 p.m., several witnesses heard what was described as thunder, thumping, stomping, pounding, glass breaking, and footsteps running through the house.

At about 2:00 a.m. the morning of 21 June 2001, law enforcement officers kicked in the door to the home and entered.

Officers found defendant on the floor in a bedroom, and found the victim in the living room, dead from severe head injuries.

On 30 July 2001, the Bertie County Grand Jury indicted defendant Dennie Lee Cherry, Jr., for first-degree murder. Defendant was tried before a jury in superior court on 13 to 16 March 2006, and found guilty of first-degree murder. Thereafter, the trial court sentenced defendant to life imprisonment without parole. Defendant appeals.

II. Discussion

Defendant contends the trial court erred when it denied defendant's request to represent himself. Defendant relies on *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992), arguing that it is "well settled in North Carolina that a defendant 'has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.'" *Id.* (quoting *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972)).

It is true that a criminal defendant has a right to waive appointed counsel and handle his own case. 331 N.C. at 673, 417 S.E.2d. at 475. However, "courts indulge in every reasonable presumption against waiver . . . of the right to counsel." *Brewer v. Williams*, 430 U.S. 387, 404, 51 L. Ed. 2d 424, 440 (1977). Thus, "the trial court must conduct a thorough inquiry" before it allows a criminal defendant to waive appointed counsel. *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476 (granting a new trial when the trial court allowed the defendant to waive appointed counsel

without conducting a thorough inquiry to ensure that defendant understood the consequences of proceeding *pro se*). On the record before us, we find that the trial court conducted a thorough *in camera* inquiry of defendant's request to waive counsel, and after the inquiry, defendant decided not to waive appointed counsel. Accordingly, we find this assignment of error to be without merit.

Defendant next assigns error to the qualification of Special Agent Jennifer Elwell as a blood stain expert. Citing Rule 702 of the North Carolina Rules of Evidence, he argues that Agent Elwell did not possess the requisite knowledge, skill, experience, training, or education to qualify her to testify as an expert.

A trial court's determination that a witness is qualified to testify as an expert is reviewed only for abuse of discretion. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984) ("A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it." (Citation and quotation omitted.)). In reviewing the trial court's qualification of an expert,

> [i]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

State v. Goode, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995) (internal citations and quotations omitted).

The record in the case *sub judice* shows that Agent Elwell is a Special Agent with the North Carolina State Bureau of

Investigation (SBI), assigned to the laboratory in the forensics biology section as a forensics DNA analyst. She was trained by the SBI for two years in the fields of body fluid analysis, blood grouping analysis, and enzyme analysis. She worked in the body fluid unit of the SBI for about thirteen years. She also had training in crime scene investigation, including blood stain pattern interpretation. She had attended seminars on body fluid analysis and had previously testified numerous times as an expert witness in the fields of forensic serology, DNA analysis, and blood spatter analysis. On the evidence before it, the trial court did not abuse its discretion when it decided to qualify Ms. Elwell as an expert in the field of blood spatter analysis.[1] Accordingly, this assignment of error is without merit.

Defendant next contends that the trial court erred when it allowed the clerk of superior court to testify that defendant had been convicted for the 16 November 1999 assault on the victim with a deadly weapon inflicting serious injury. Defendant relies on *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583 (2002). In *Wilkerson*, the North Carolina Supreme Court reversed this Court's decision, 148 N.C. App. 310, 559 S.E.2d 5 (2002), *per curiam* for the reasons stated in Judge Wynn's dissent, which opined that the bare fact of a prior conviction, elicited from the clerk of court

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[1]This Court has already considered the question of whether Agent Elwell is qualified as a blood stain expert, holding that "[i]t is not unreasonable to conclude that, based on [Agent Elwell's] extensive experience with blood evidence, she would be better qualified than a jury to form an opinion as to the cause of particular bloodstains." *State v. Bruton*, 165 N.C. App. 801, 810, 600 S.E.2d 49, 55 (2004).

only for the purpose of showing intent under Rule 404(b), is irrelevant and should be excluded by Rule 402. *Wilkerson*, 148 N.C. App. at 320, 559 S.E.2d at 11-12 (Wynn, J., dissenting).

The State contends that testimony of the prior conviction was relevant because it helped show the context of the crime, that is, it was relevant for the State to show that defendant was in prison because the presence of his DOC t-shirt and hat beside the steps of the victim's home was circumstantial evidence linking him to her murder. Alternatively, the State contends that even if this testimony was irrelevant, its admission was harmless because an eyewitness to the 16 November 1999 assault testified at trial.

Defendant did not object at trial to the admission of this evidence, so we review only for plain error. N.C.R. App. P. 10(c)(4). "To satisfy the requirements of the plain error rule, the Court must find error, and that if not for the error, the jury would likely have reached a different result." *State v. Holmes*, 120 N.C. App. 54, 64, 460 S.E.2d 915, 921 (1995).

Assuming, without deciding, that the admission of the clerk's testimony as to defendant's conviction was error, we conclude that it did not rise to the level of plain error. Eyewitness testimony, which was not assigned as error, recounted the 16 November 1999 assault in detail, and identified defendant as the perpetrator. In light of this testimony, which was clearly relevant to defendant's motive and intent, *State v. Harris*, 149 N.C. App. 398, 404, 562 S.E.2d 547, 550 (2002), we perceive no likelihood that the jury

would have reached a different result absent the testimony that defendant had been convicted of the 16 November 1999 assault.

Defendant next assigns error to testimony that he shot the victim in 1977. He argues that his actions in 1977 are too dissimilar and too attenuated in time to be relevant to establishing malice or ill will toward victim in 2001.

The North Carolina Supreme Court has "repeatedly held that a defendant's prior assaults on the victim, for whose murder defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim." *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995). "Furthermore, in cases where a husband is accused of killing his wife, the State may introduce evidence that *encompasses his married life* in order to prove malice, intent, and ill will toward the victim." *State v. Allen*, 346 N.C. 731, 740, 488 S.E.2d 188, 193 (1997) (emphasis added).

We conclude that evidence that defendant shot the victim in 1977[2] was relevant to show malice, intent or ill will, and the trial court did not err when it admitted that evidence. Accordingly, this assignment of error is overruled.

Defendant lastly contends that the trial court erred when it denied his motion to dismiss the charge of first-degree murder. He

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[2]The record does not contain the date of the marriage of defendant and victim. However, the evidence supports the inference that they were married at that time and when this specific issue was discussed before the trial court, no one disputed that the parties were married when the 1977 assault occurred.

argues that the State failed to establish the essential elements of the crime, including premeditation and deliberation.

> N.C. Gen. Stat. § 15A-1227 (2005) allows a defendant to move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction. Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense. The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*.

State v. Bagley, ___ N.C. App. ___, ___, 644 S.E.2d 615, 621 (2007) (internal citations and quotations omitted). First-degree murder

> is the unlawful killing of a human being with malice, premeditation, and deliberation. The element of premeditation requires the state to show that the accused formed the specific intent to kill at some time, however brief, before the killing took place. Deliberation is the intention to kill, and it must be formed not in the heat of passion, but while defendant is in a cool state of blood.

State v. Nicholson, 355 N.C. 1, 37, 558 S.E.2d 109, 134 (2002) (internal citations and quotations omitted).

The State presented evidence that defendant had shot the victim at least two times over the course of their married life. Furthermore, on the day that the victim was killed, defendant entered the home occupied by the victim, and defendant and the victim were alone together in the trailer for several hours. Law enforcement officers heard sounds consistent with a struggle. When police entered the home, they found broken furniture, broken glass and blood spatters in several areas of the home. The victim was

found dead of severe head injuries. The victim's skull was shattered and her brain was "essentially . . . pulverized." The severity and extent of the victim's wounds are circumstances from which the jury may infer premeditation and deliberation. *Bullard*, 312 N.C. at 161, 322 S.E.2d at 388. This evidence, viewed in the light most favorable to the State, is substantial evidence to support a jury finding that defendant acted with malice, premeditation and deliberation in killing the victim. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of first-degree murder.

III. Conclusion

For the reasons stated above, we conclude that the trial court did not err when it denied defendant's request to represent himself. We also conclude that the trial court did not err when it allowed Agent Elwell to testify as a blood stain expert. Additionally, we conclude that the trial court did not commit plain error when it allowed the clerk of superior court to testify that defendant had previously been convicted of assaulting victim with a deadly weapon inflicting serious injury. We further conclude that the trial court did not err when it allowed the State to present testimony that defendant had shot the victim in 1977. Finally, we conclude that the trial court did not err when it denied defendant's motion to dismiss the charge of first-degree murder on the grounds of insufficient evidence to sustain a conviction. Accordingly, we hold that defendant received a fair trial, free of plain or prejudicial error.

NO ERROR.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).