NO. COA06-1646

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2007

STATE OF NORTH CAROLINA

v. Guilford County
No. 04 CRS 96693

JOSEPH CLARK FLEMING

Appeal by Defendant from judgment entered 21 July 2006 by Judge Carl R. Fox in Superior Court, Guilford County. Heard in the Court of Appeals on 29 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Terry W. Allred for Defendant.

McGEE, Judge.

Joseph Clark Fleming (Defendant) was convicted on 21 July 2006 of first-degree murder. The trial court sentenced Defendant to life imprisonment without parole. Defendant appeals.

The evidence presented at trial tended to show the following: Defendant and Johnny Hanner (Mr. Hanner) had known each other for over thirty years. The two men were friends and belonged to the same social group. However, they had frequent disputes, including a quarrel over rental property that resulted in Defendant threatening physical violence against Mr. Hanner. That incident led to a four-year estrangement in their relationship. Defendant

and Mr. Hanner reconciled in 2003, but in October 2004, their tempers flared again. Numerous acquaintances of the two men testified that while Defendant was on vacation in Arizona, Defendant telephoned Mr. Hanner. During the telephone conversation, Mr. Hanner made a disparaging remark about Defendant's family. In response, Defendant threatened to kill Mr. Hanner.

Nine days after this telephone conversation, on the afternoon of 25 October 2004, Mr. Hanner was found dead on his couch by a friend. The friend observed a large laceration across Mr. Hanner's throat and called police.

Defendant's wife, Robin Fleming (Mrs. Fleming), returned home from work at 5:00 p.m. on 25 October 2004 to find Defendant behaving oddly. Mrs. Fleming took Defendant down the street to her father's house. Defendant admitted to Mrs. Fleming and his father-in-law that he had killed Mr. Hanner. Defendant's father-in-law convinced Defendant to call the police. Sergeant Mozelle Stancil (Sergeant Stancil) responded to the call and took Defendant to the sheriff's office. Officers then obtained a search warrant for Defendant's home. While executing the warrant, Sergeant Stancil found a knife and a pair of Defendant's pants, both of which were stained with blood. Police also found blood inside Defendant's truck. Subsequent DNA tests determined that the blood in all three locations belonged to Mr. Hanner.

A medical examiner performed an autopsy on Mr. Hanner the following day. The medical examiner observed ten stab wounds on

Mr. Hanner's face, including a fatal eight-inch wound that ran from Mr. Hanner's neck to his left ear. The nature of the wounds suggested the wounds were inflicted by a person standing over Mr. Hanner while Mr. Hanner was lying down. The medical examiner found no defensive wounds on Mr. Hanner.

At trial, Defendant admitted that he was guilty of second-degree murder. The jury was instructed as to first-degree and second-degree murder, and found Defendant guilty of first-degree murder. Defendant appeals his conviction and argues that the trial court should have dismissed the first-degree murder charge due to insufficiency of the State's evidence against him. Defendant also requests that his conviction be reversed and that he be granted a new trial on the ground that he was denied effective assistance of counsel at trial. We find no error.

I.

Defendant first challenges the trial court's failure to dismiss the first-degree murder charge due to insufficiency of the evidence presented by the State against him. Defendant has not properly preserved this argument for appellate review. At trial, defense counsel moved to dismiss after the close of the State's evidence. The trial court denied the motion. Defendant subsequently presented evidence but did not renew his motion to dismiss at the close of all the evidence. Under N.C.R. App. P. 10(b)(3) (2006):

> If a defendant makes [a motion to dismiss] after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces

> evidence, his motion for dismissal . . . made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

Because Defendant did not renew his motion to dismiss at the close of all the evidence, his challenge to the trial court's denial of his motion to dismiss is not properly preserved for appellate review.

Defendant asserts, however, that the trial court's failure to dismiss the charge against him was plain error that may be reviewed by this Court. Defendant is incorrect. We have consistently held that with regard to insufficiency challenges, a "[d]efendant's attempt to invoke plain error review is inappropriate as this assignment of error concerns the sufficiency of the evidence, not an instructional error or an error concerning the admissibility of evidence." *State v. Bartley*, 156 N.C. App. 490, 494, 577 S.E.2d 319, 322 (2003) (plain error review unavailable where the defendant's motion to dismiss was not properly preserved for appellate review under N.C.R. App. P. 10(b)(3)). *See also State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (declining plain error review where N.C.R. App. P. 10(b)(3) precluded review); *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004) (noting that "[p]lain error . . . only applies to jury instructions and evidentiary matters in criminal cases"). This assignment of error is overruled.

II.

Defendant next contends that he was denied effective

assistance of counsel at trial, in violation of his state and federal constitutional rights.

The test for ineffective assistance of counsel is identical under both the United States Constitution and the North Carolina Constitution:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). *See State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* test in North Carolina). To demonstrate prejudice, Defendant must show that "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248.

Defendant asserts that his counsel's performance was deficient because counsel did not renew Defendant's motion to dismiss at the close of all the evidence, thus precluding appellate review of the matter under N.C.R. App. P. 10(b)(3). Certainly, it would have been proper for defense counsel to renew the motion to dismiss. However, even were this an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant," *Strickland*,

466 U.S. at 687, 80 L. Ed. 2d at 693, we find that Defendant did not suffer prejudice as a result of this error.

To have survived Defendant's motion to dismiss, had Defendant made such a motion at the close of all the evidence, the State must have presented "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [D]efendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Considered in the light most favorable to the State, the evidence must have "give[n] rise to a reasonable inference of guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981). However, "[i]f the evidence [was] sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it," the trial court would have been required to grant Defendant's motion to dismiss. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117.

The elements of first-degree murder under N.C. Gen. Stat. § 14-17 are: "(1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000). A defendant premeditates if he or she "form[s] the specific intent to kill the victim for some length of time, however short, before the actual killing." *State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994). A defendant deliberates if he or she "form[s] the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation." *State v.*

Truesdale, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995).

Defendant argues that the State did not introduce sufficient evidence that he acted with premeditation and deliberation, thus negating element (4) of the offense. Our Courts have identified numerous circumstantial factors that a jury may consider when determining whether a defendant premeditated and deliberated on a killing:

> (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991). Many of these factors are present in the case before us: (a) Defendant and Mr. Hanner had a long relationship marred by disputes and threats; (b) witnesses testified that Defendant had threatened to kill Mr. Hanner during prior quarrels, and had renewed the threat in the week prior to the killing; (c) while there was evidence that Mr. Hanner had made a disparaging remark about Defendant's family a week earlier, there was no evidence that Mr. Hanner had done anything to provoke Defendant in the hours or days before the killing; (d) the nature of Mr. Hanner's wounds suggested that at the time of the killing, Mr. Hanner was lying on his couch and made no effort to defend himself; and (e) in addition to the fatal laceration across his neck, Mr. Hanner also suffered ten stab

wounds to his neck and face.

It is correct that Defendant offered some evidence that he did not act with premeditation and deliberation. For example, one of Defendant's expert witnesses, a forensic psychologist, expressed an opinion that Defendant was not in a clear or cool state of mind when he killed Mr. Hanner. Another expert witness in the same field testified that during the killing Defendant was intoxicated and suffered from psychiatric disorders. However, the physical and circumstantial evidence presented by the State was sufficient to permit the jury to determine the question of premeditation and deliberation.

We find that the State presented substantial evidence that Defendant committed each element of the crime of first-degree murder. Therefore, we hold that there is no reasonable probability that had defense counsel renewed the motion to dismiss at the close of all the evidence, a different result would have been reached in this case. Defendant's claim of ineffective assistance of counsel at trial therefore fails.

No error.

Judges STEPHENS and SMITH concur.

Report per Rule 30(e).