NO. COA06-584

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

STATE OF NORTH CAROLINA

v. Columbus County
No. 04 CRS 53546

WEBSTER DAYTON VANN

Appeal by defendant from judgment entered 17 November 2005 by Judge Ola Lewis in Columbus County Superior Court. Heard in the Court of Appeals 7 December 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.*

*Geoffrey W. Hosford for defendant.*

LEVINSON, Judge.

Defendant (Webster Dayton Vann) appeals judgment entered upon his conviction for second degree murder. We find no error.

The relevant facts may be summarized as follows: Tiwon Davis testified that on 17 September 2004, a group of individuals, including defendant and Raymond Lamont "Luke" Andrews (hereinafter Andrews), convened at Franklin's, a social gathering location in Cedar Grove, North Carolina. Andrews argued with Stefon Geathers, a friend, concerning a potential drug transaction. Geathers told Andrews that he was becoming impatient with the length of time it had taken Andrews to procure marijuana Geathers wished to purchase.

Davis further testified that during the argument, defendant approached Andrews. In response, Andrews struck defendant in the jaw. Defendant then brandished a knife and stated, "I'm not going to cut you, but the next time your mother sees you, she'll be looking down on you."

The following evening, a party was held at the residence of Brittany George. Shortly after defendant arrived at the party, Tiwon Davis observed defendant display what he thought was an automatic rifle and proclaim that if "[a]nybody love[s] . . . [Andrews], call him right now, tell him I'm looking for trouble." Soon thereafter, at approximately 1:00 a.m., Davis and some acquaintances went to the "Boom-Boom Room" in Bladenboro, North Carolina. Davis observed defendant and Weathers together at the Boom-Boom Room. Maurice Brown, a friend of defendant and Weathers, got into an altercation with another individual at the Boom-Boom Room. In an attempt to "help" Brown, Weathers went to defendant's car to retrieve the rifle. After leaving the club, Davis and his acquaintances went to RC's, an abandoned store in Mt. Olive, North Carolina.

According to Davis, defendant and Geathers also went to RC's during the early morning hours of 18 September 2004. Shortly thereafter, Andrews arrived. Andrews walked by defendant, who was standing near his vehicle. With rifle in hand, defendant stated to Andrews, "Oh, you think this is a joke? You think it's a game? You think it's a toy, it won't spit?" Andrews held his hands up to defendant. Defendant fired the rifle, striking Andrews four times.

Defendant fled the scene. Andrews died as a result of the shooting. Defendant was convicted of second degree murder and sentenced to 220-273 months imprisonment. From this judgment defendant now appeals.

In defendant's first argument on appeal, he contends that the trial court committed plain error by allowing the State to elicit certain testimony from Detective Sergeant David Nobles that violated his right not to incriminate himself. Specifically, defendant contends it was error for the trial court to allow the following questions and responses during the State's redirect examination of Nobles:

> Q. Did Mr. Vann call your office and want to tell you his side of what happened in this case within hours after the killing took place?
>
> A. Not to my knowledge.
>
> . . . .
>
> Q. Did Mr. Vann, at any time, has he at any time either personally or through his attorney, called you up and said come in, I want to tell you my side of it?
>
> A. No, sir.
>
> Q. If they had done that, would you have come in and sat down and interviewed him?
>
> A. Yes, sir.
>
> Q. Would you have been willing to do that with his attorney in the same room?
>
> A. Yes, sir.

Preceding the examination that is the subject of this argument on appeal, defense counsel had the following colloquy with Nobles on cross-examination:

> Q. . . . Now Detective Nobles, part of what you do in your work as an investigator, you try to find the truth of what a case is about, don't you sir?
>
> A. Yes, sir.
>
> . . . .
>
> Q. Okay. And Mr. Vann, you weren't able to find him until several hours after this when he came to the Sheriff's Department and turned himself in, were you sir?
>
> A. Correct.
>
> Q. And did you make any effort to interview Mr. Vann, Detective Nobles?
>
> A. I did not.
>
> Q. Did – you know – you know who did what in this investigation, don't you sir?
>
> A. Basically, correct.
>
> Q. Did Detective Glenn make any effort to interview Mr. Vann to determine what happened, what his version of the facts in this case [were], sir?
>
> A. Not to my knowledge.
>
> Q. Did Detective Coffman make any effort to interview Mr. Vann, to determine what his version of the facts were in this case?
>
> A. Not to my knowledge.
>
> Q. Okay. Did anyone in fact from the Sheriff's Department or the SBI, or any other law enforcement agency, to your knowledge, make any effort to interview Mr. Vann to determine what his version of this situation was?

A. No sir.

The law regarding the admission of evidence regarding a defendant's right to remain silent following his arrest is well established:

> It is impermissible for the trial court to admit testimony relating to a defendant's exercise of his right to remain silent and to request counsel. Such an error requires the defendant be granted a new trial unless it can be shown the error was harmless beyond a reasonable doubt. However, [where] defense counsel failed to object to this testimony at trial . . . our review is limited to plain error. . . . In *State v. Alexander*, our Supreme Court held the admission of testimony regarding the defendant's post-arrest silence did not constitute plain error because (1) the comments regarding the defendant's silence were relatively benign; (2) the prosecutor did not attempt to emphasize the defendant's silence; and (3) the evidence of the defendant's guilt was substantial.

*State v. Walker*, 167 N.C. App. 110, 130, 605 S.E.2d 647, 660-61 (2004)(internal citations omitted), *disc. review denied*, 359 N.C. 642, 614 S.E.2d 921 (2005). "[T]o constitute plain error the appellate court must be convinced that absent the error, the jury probably would have reached a different verdict." *Id.* (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)).

Here, defendant opened the door to the challenged testimony. "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994) (quoting *State v. Rose*,

335 N.C. 301, 337, 439 S.E.2d 518, 538 (1994), *overruled on other grounds*, *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001)). The subjects of defendant's absence and failure to make a statement were first raised by defendant during his cross-examination of Nobles. Defense counsel's questions sought to suggest that the investigation was incomplete in that investigators failed to interview defendant to get his "version" of the facts, and to suggest that defendant was readily available to make a statement but that law enforcement nonetheless failed to interview him. The State was therefore entitled, on redirect examination, to rebut these suggestions. We observe, too, that other than the challenged testimony, the record does not reveal any comment by the State emphasizing defendant's failure to testify.

Moreover, there was substantial evidence of defendant's guilt. The night before Andrews was killed, defendant expressed an intent to harm him. In addition, defendant initiated a verbal confrontation with Andrews at RC's and, with rifle in hand, stated, "Oh, you think this is a joke? You think it's a game? You think it's a toy, it won't spit?" And it was uncontradicted that defendant fired the rifle at Andrews, striking him with four bullets.

On this record, we cannot hold that the admission of Nobles' testimony constitutes plain error. This assignment of error is overruled.

In defendant's second argument on appeal, he contends that the trial court committed plain error by failing to declare a mistrial

after a witness, Maurice Brown, was discovered listening outside the courtroom door to the testimony of other State's witnesses. Specifically, defendant argues that such conduct impacted the integrity and fairness of defendant's trial.

To establish plain error, a defendant must demonstrate "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Plain error review is only available for errors in the admission of evidence and jury instructions. *State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003). In the instant case, as defendant's argument pertains neither to jury instructions nor evidentiary issues, plain error review is unavailable. Hence, as this issue was not properly preserved for appellate review, the assignment of error is rejected. *See State v. McCall*, 162 N.C. App. 64, 70, 589 S.E.2d 896, 900 (2004) (plain error review is unavailable to review a trial court's failure to declare a mistrial *sua sponte* after it learned that individuals in the courtroom had been signaling to the victim during her testimony).

In defendant's final argument on appeal, he contends that the trial court abused its discretion by denying his motion for appropriate relief (MAR) on the grounds that the State presented insufficient evidence to support the jury's verdict of second degree murder, and that the State failed to refute defendant's claim of self defense at trial. We disagree.

Defendant made a timely motion pursuant to N.C. Gen. Stat. § 15A-1414(b)(2)(2005). This section provides, in pertinent part, that "all errors, including but not limited to the following, must be asserted within 10 days after entry of judgment: [t]he verdict is contrary to the weight of the evidence."

We review the trial court's order denying a motion for appropriate relief under an abuse of discretion standard. *State v. Haywood*, 144 N.C. App. 223, 236, 550 S.E.2d 38, 46 (2001). An abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

The elements of second-degree murder are: (1) the unlawful killing; (2) of another human being; (3) with malice; but (4) without premeditation and deliberation. N.C. Gen. Stat. § 14-17 (2005); *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46-47 (2000). Our Supreme Court has determined that "'intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice.'" *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000)(quoting *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991)). Malice is not necessarily an actual intent to take human life. *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978). "[I]t may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly

as to manifest depravity of mind and disregard of human life." *Id.* at 578-79, 247 S.E.2d at 916 (citations omitted).

A killing, such as second degree murder, is committed in perfect self-defense if, at the time of the killing:

> (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. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (citations omitted). "The State bears the burden of proving that defendant did not act in self-defense." *State v. Ammons*, 167 N.C. App. 721, 725, 606 S.E.2d. 400, 403 (2005) (quoting *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985)).

> To negate the defense of self-defense altogether, the State need only prove beyond a reasonable doubt the non-existence of either the first or second element, i.e., either defendant had no belief that it was necessary to kill to save himself from death or great bodily harm, or that defendant's belief, if he had one, was unreasonable because the circumstances as they appeared to defendant were not sufficient to create such a belief in the mind of a person of ordinary firmness.

*Ammons*, 167 N.C. App. at 726, 606 S.E.2d. at 404 (quoting *State v. Reid*, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994)).

Here, the evidence supports a conclusion that defendant acted with malice in killing Andrews. In addition, the evidence fails to illustrate that defendant held a reasonable belief that it was necessary for him to kill Andrews to save himself from either death or great bodily harm. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for appropriate relief. This assignment of error is overruled.

No error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).