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NO. COA06-639

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

McDowell County
No. 04 CRS 618

BILLY RICHARD BINGHAM, JR.

Appeal by defendant from judgment entered 22 July 2005 by Judge Zoro J. Guice, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 7 February 2007.

Attorney General Roy Cooper, by Solicitor General Christopher G. Browning, Jr., for the State.

C. Gary Triggs for defendant.

LEVINSON, Judge.

Billy Richard Bingham, Jr. (defendant) appeals judgment entered upon his conviction for first degree murder. We find no error.

The pertinent facts may be summarized as follows: Rory Kelly testified that during the early morning of 5 October 2003, the deceased, Robert Rhom (Rhom), and others congregated at Rhom's house to celebrate Nathan Frady's birthday. There, the men heard a lawn mower approaching the house. Rhom informed his friends that the "lawn mower man" was coming and that they needed to go inside the house to "hide out." The men went into the house without turning on the lights and remained silent. Shortly thereafter,

defendant began knocking on Rhom's door and demanded to come inside. Defendant eventually left. Kelly further testified that approximately fifteen (15) minutes thereafter, defendant returned on his lawn mower, entered the Rhom residence, and began cursing at Rhom. Rhom demanded that defendant leave. Defendant responded, "[m]ake me get out of your house." Although defendant eventually exited the house, he did not leave Rhom's yard. When Rhom repeated his demand that defendant leave, defendant pushed Rhom and the two had a physical altercation. Kelly testified that Rhom hit defendant "a few times." Following the dispute, defendant left on his lawn mower. As defendant left, he stated to Rhom that "it wasn't over."

Kelly also testified that, following the altercation, Rhom realized that he had lost his cell phone. Rhom, Kelly and Frady began looking for the cell phone in the front yard. As they were searching, defendant and his mother drove up to Rhom's house. Defendant's mother told Kelly that her son had also lost a cell phone and that they had come to look for it. Within seconds, a cell phone rang in defendant's pocket. Defendant then walked toward Rhom. Defendant's mother attempted to intervene, stating, "Don't do this. Don't do this." Defendant approached Rhom, stating, "I'm sobered up now and [it's] f[-----] up you did me that way." Defendant retrieved a knife from behind his back and stabbed Rhom in the stomach. Defendant and his mother then left the Rhom residence.

Donald Blevins of the Marion Police Department testified that he spoke with defendant and defendant's mother on the morning of 5 October 2003. Defendant stated that he had been involved in a stabbing, and that he had thrown the knife out of the car on Rutherford Road. Charles Oliver, also of the Marion Police Department, testified that the knife was found in a ditch on Rutherford Road with the help of defendant's mother.

Dudley Greene of the McDowell County Sheriff's Office also spoke with defendant on the morning of 5 October 2003. Defendant described the fight as follows: He was attempting to leave Rhom's property when Rhom knocked him off the lawn mower. Defendant asserted that Rhom punched him 12-14 times when he was at Rhom's residence the first time. Thereafter, he told his mother that "if they jumped on him he would stop it." He and his mother returned to Rhom's house to retrieve a cell phone. As they drove up, he reached out of the car and picked up the cell phone. Defendant then got out of the car, carrying a 12 inch knife. When asked whether the knife he used had come from his mother's kitchen, defendant stated, "[I]f I told you I done that, it would be premeditation." Finally, defendant stated he stabbed Rhom after Rhom swung at him.

Dr. Donald Jason was the forensic pathologist who performed an autopsy upon Rhom. Jason described the stab wound to Rhom's stomach, noting that it was eight inches deep. He further described a "defense wound" that Rhom received to his thumb. He

opined that Rhom died of internal bleeding from the stab wound to his stomach.

Defendant was convicted of first degree murder and sentenced to life imprisonment without the possibility of parole. Defendant now appeals.

In defendant's first argument on appeal, he contends that the "[t]rial [j]udge's numerous negative comments to defense counsel, both in and out of the presence of the jury, created a negative atmosphere . . . to the prejudice of the [d]efendant." Specifically, defendant argues that the trial court's: (1) denial of certain evidentiary *voir dire* hearings; (2) sustaining objections to certain questions; and (3) general demeanor and other conduct created a "pervasive pattern that was so disrespectful and so disruptive" as to prejudice defendant's rights to due process under the Fourteenth Amendment to the United States Constitution. We disagree.

"The judge's duty of impartiality extends to defense counsel. He should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in defendant's behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983) (citation omitted). A totality of the circumstances test is used to ascertain whether a judge's comments cross into the "realm of impermissible opinion." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citation omitted). A judge's broad discretionary power to supervise and control the trial "will not be disturbed absent a

manifest abuse of discretion." *State v. Goldman*, 311 N.C. 338, 350, 317 S.E.2d 361, 368 (1984) (citation omitted). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) (citation omitted)

It is generally within the discretion of the trial court to regulate if and when evidentiary *voir dire* hearings take place. See *State v. Holder*, 331 N.C. 462, 477, 418 S.E.2d 197, 205 (1992) (defendant is unable to show either an abuse of discretion or harm resulting from not having a *voir dire* hearing before tape recording was authenticated). In addition, the trial court has wide discretion to ensure forward progress and proper decorum during the trial. See *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861 (1995) (trial court has "duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination").

In the present case, the trial court denied certain *voir dire* hearings, prohibited defense counsel from asking repetitive questions, and made certain comments to defense counsel that are now noted on appeal. Before Kelly's testimony, for example, defense counsel asked for a *voir dire* hearing which was denied by the trial judge. During cross-examination of Kelly, the trial judge stated, "Any other questions? . . . Let's move along and not

ask the same question half a dozen times." The trial court also informed defense counsel in regards to requesting a full copy of a case that, "I can't rule on headnotes, I need to rule on cases. Kind of like you know, brown book and green book law." In addition, after defense counsel made an argument, the trial judge stated, "[w]ouldn't that make a good jury argument for you?"

We have reviewed the complete record, and conclude that defendant has not shown that the trial court's comments and/or conduct prejudiced the outcome of the trial. The relevant assignments of error are overruled.

In defendant's next argument on appeal, he contends that the trial court erred by denying his motions to exclude his statements and those of several other witnesses.

N.C.R. App. P. 10(c)(1) provides, in pertinent part, that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." "One purpose of this rule is to 'identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position.'" *State v. Baggett & Penuel*, 133 N.C. App. 47, 48, 514 S.E.2d 536, 537 (1999) (quoting *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988)). "[A]ssignments of error [that are] . . . broad, vague, and unspecific . . . do not comply with the

North Carolina Rules of Appellate Procedure[.]” *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002).

Defendant assigned as error the following:

19. The Court’s improperly allowing the State to introduce into evidence the statement of Joe Noblitt, Exhibit 14, and thereafter allowing Detective Carpenter to read the statement to the jury over Defendant’s objection.

20. The Court’s improperly allowing the State to introduce into evidence the statement of Rory Kelly, Exhibit 11, and thereafter allowing Detective Carpenter to read the statement to the jury over Defendant’s objection.

21. The Court’s improperly allowing the State to introduce into evidence the statement of Kevin Frady, Exhibit 13, and thereafter allowing Detective Carpenter to read the statement to the jury over Defendant’s objection.

22. The Court’s allowing purported statements of the Defendant into evidence over Defendant’s objection.

Here, defendant’s assignments of error corresponding to this argument fail to comply with the requirements of Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure. The assignments do not “state a legal basis upon which error is assigned.” The assignments fail to articulate a rationale for why the trial court’s actions were in error. Accordingly, the relevant assignments of error are dismissed. *See Broderick v. Broderick*, 175 N.C. App. 501, 503, 623 S.E.2d 806, 807 (2006) (dismissing assignment of error which failed to set forth a legal issue for determination). We have nonetheless reviewed the admission of the

statements and have not discerned error on the part of the trial court.

In defendant's next argument on appeal, he contends that the trial court erred by denying his motion to dismiss the charge of first degree murder at the close of all evidence. We disagree.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (internal citations and quotation marks omitted).

"The elements of [premeditated] first-degree murder 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) (citation omitted).

'Premeditation is defined as thought beforehand for some length of time no matter how short. Deliberation means an intention to kill executed by the defendant in a cool state of blood. Cool state of blood as used in connection with premeditation and deliberation does not mean absence of passion and emotion

but means that an unlawful killing is deliberate and premeditated if executed with a fixed design to kill notwithstanding defendant was angry or in an emotional state at the time.'

State v. Burgess, 345 N.C. 372, 386-87, 480 S.E.2d 638, 645-46 (1997) (quoting *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986)). "Malice is . . . a state of mind which prompts one person to take the life of another without just cause, excuse or justification." *State v. Hamilton*, 77 N.C. App. 506, 511, 335 S.E.2d 506, 509-10 (1985) (citing *State v. Love*, 296 N.C. 194, 250 S.E.2d 220 (1978)).

The evidence in the light most favorable to the State shows that defendant killed Rhom by thrusting a kitchen knife into his stomach. After an initial confrontation, defendant left the Rhom residence, stating, "it wasn't over." Defendant told his mother that "if they jumped on him [defendant] he would stop it." Upon defendant's return to Rhom's residence, he approached Rhom and stated, "I'm sobered up now and [it's] f[-----] up you did me that way." Defendant retrieved the knife from behind his back and stabbed Rhom in the stomach. Defendant and his mother then left Rhom's residence. The evidence was sufficient to submit the charge of first degree murder to the jury, and this assignment of error is therefore rejected.

In a related argument, defendant contends that the trial court erred by denying his motion made on 22 July 2005 pursuant to N.C. Gen. Stat. § 15A-1227 (2005) to set aside the jury's guilty verdict of first degree murder.

"The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss, i.e., whether there is substantial evidence of each essential element of the crime." *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000) (citing *State v. Young*, 120 N.C. App. 456, 462 S.E.2d 683 (1995)). The same reasoning that supports the conclusion that substantial evidence was presented as to each element of first degree murder also supports the conclusion that the trial court did not err by denying defendant's motion to set aside the verdict. This assignment of error is overruled.

In defendant's final argument, he contends that the trial court erred by failing to properly instruct the jury. Specifically, defendant argues that the trial court committed prejudicial error by overruling his objections to the State's requests for pattern jury instructions 104.60 Admissions; 104.70 Confessions; and 105.21 False or Contradictory Statements. However, we need not reach the merits of this issue, as defendant has failed to comply with Rule 28 of the North Carolina Rules of Appellate Procedure.

N.C.R. App. P. 28(b)(6) provides, in relevant part, that "[a]ssignments of error not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." In the instant case, defendant neither cites legal authority nor presents any meaningful argument in support of his contention that the trial court improperly

instructed the jury. Hence, this assignment of error is deemed abandoned. *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 642, 624 S.E.2d 371, 379 (2005).

No error.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).