NO. COA08-1474

NORTH CAROLINA COURT OF APPEALS

Filed: 21 July 2009

STATE OF NORTH CAROLINA

v. From Robeson County
No. 05 CRS 50555

ERIC DYWANE CROSS

Appeal by Defendant from judgment entered 23 May 2008 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 8 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Brian Michael Aus for Defendant.

STEPHENS, Judge.

Facts and Procedural History

On 13 June 2005, Defendant was indicted for first-degree murder. Defendant was tried before a jury at the 19 May 2008 Criminal Session of Robeson County Superior Court, Judge Gary L. Locklear presiding. The jury convicted Defendant of second-degree murder, and Judge Locklear imposed a prison term of 189 to 236 months. From this judgment and imprisonment, Defendant appeals.

The evidence presented by the State at trial tended to show the following: In the late evening of 27 January 2005, Lumberton Police Department ("LPD") Officer Peter Marcinsky ("Officer

Marcinsky") was dispatched to the scene of a shooting at 305 South Seneca Street in Lumberton. Present at the residence that evening were Monacka Brunson, who resided at the address; Kathy Floyd, Monacka Brunson's mother; Timothy Brown, the father of Monacka Brunson's child; Eric Bryant ("Bryant"), Timothy Brown's brother; Nancy Brunson, Monacka Brunson's sister; and Cedric Sinclair and Christopher McLean. At the time of the shooting, Timothy Brown, Bryant, and Christopher McLean were outside on the porch, while Nancy Brunson and Cedric Sinclair were inside the residence. Monacka Brunson and Kathy Floyd were away from the home.

Upon arrival, Officer Marcinsky was informed that Bryant had been shot. After Officer Marcinsky unsuccessfully attempted CPR on Bryant, EMS arrived and transported Bryant to the hospital, where he was later pronounced dead. The autopsy concluded that Bryant died from a gunshot wound to his chest.

While at the residence, Officer Marcinsky spoke with Monacka Brunson, who identified as possible suspects two members of the Folks Nation, a gang whose members previously shot Timothy Brown. According to Monacka Brunson, Bryant and Timothy Brown were not members of a gang, but Brown was known to associate with the Bloods gang.

Around 1:00 a.m. on the morning of 28 January 2005, LPD Detective Vernon Johnson ("Detective Johnson") arrived to process the crime scene. On the porch of the residence, Detective Johnson observed bullet holes in the door and railing. The track of the

bullet holes indicated the bullets were fired from the direction of the road.

Later that morning, LPD Master Patrolman Donald Southern ("Southern"), who had been assigned to investigate the shooting, was informed by a detective that one of the suspects in the shooting was believed to be driving a gray Dodge Stratus located at the residence of Michelle Jacobs. Based on information that the suspects might have been at that location, Southern placed the residence under surveillance.

When surveillance indicated that the Stratus had left the residence, the vehicle was intercepted and its two occupants, Courtney Hunt ("Hunt") and Carl Jones ("Jones"), were detained and questioned. Before being taken to the police station, Hunt called the Jacobs' residence to inform Jacobs that the police were taking Hunt to the station.

During questioning, Hunt and Jones gave statements identifying Defendant as the gunman at the Seneca Street shooting. In their statements, which were admitted at trial, Hunt and Jones claimed that on the night of 27 January 2005, Hunt was driving around in a red Jeep Cherokee with Jones and Duwan Baldwin ("Baldwin") when they met Defendant at a convenience store. Defendant got in the backseat of the Jeep and the four continued to drive around. The four later met two men, Nathaniel Thompson ("Thompson") and Kenny Ray Floyd ("Floyd"), driving a gray Dodge Stratus and followed the Stratus as it was driven around the Lumberton area. While turning out of an intersection on South Seneca Street, Defendant said,

"Look, that's where them niggers stays[.]" Defendant then said he was about to shoot. From the driver's seat, Hunt heard gunshots and saw Defendant at the rear passenger's side window firing a weapon in the direction of the houses on the street. Sitting with Defendant in the backseat, Jones saw Defendant fire at least six shots from a .32 caliber revolver at several men on the porch of a house on South Seneca Street. Hunt then drove away from the area and dropped Baldwin at his home. Jones then moved into the driver's seat and drove the Jeep to the Jacobs' residence. Hunt went into the residence while the others left with the Jeep and the Stratus. Defendant, Jones, Thompson, and Floyd later returned to the Jacobs' residence with only the Stratus. After learning that Bryant had been killed that night, Hunt and Jones left the house and were apprehended by law enforcement.

While Hunt and Jones were detained, LPD surveillance observed at least one suspect flee from the Jacobs' residence into the woods behind the apartment, at which point LPD approached the residence. While a search of Jacobs' apartment was conducted, LPD canine handlers used a tracking dog to search the adjacent wooded area for suspects. The testimony of one canine handler indicated that the tracking dog could follow the scent of a person based on "riffs," or dead skin cells put off during high adrenaline situations. After tracking Defendant in the woods for approximately 30 minutes, the canine handlers heard Defendant call out something to the effect of, "Don't let the dog go, I'm coming out[.]" Defendant then came out of the wooded area and was placed in custody.

Around 6:00 a.m. on 28 January 2005, Defendant was transported to the police station, where he was allowed to sleep for several hours. At 8:45 a.m., Defendant was awakened and then questioned by Southern. Southern testified that after reading Defendant his rights and informing Defendant that he was being charged with first-degree murder, Defendant volunteered that he had been drinking the previous night and did not remember what had happened. Southern also testified that Defendant was wondering aloud, "[W]hy did he shoot anyone, why did he get in the car with those guys." Southern further testified that Defendant admitted he was in the car with Hunt and Jones the night before.

A search of the wooded area where Defendant was located uncovered a .32 caliber revolver. While being held in the Robeson County Detention Center, Defendant made a call to his mother during which he told his mother that the police found a gun in the woods and that the gun was his. Special Agent Trochum, a forensic firearm expert with the State Bureau of Investigation, fired a test bullet from the recovered gun and compared that bullet with the bullet that killed Bryant. Special Agent Trochum testified that, while he could not say with certainty that the bullet which killed Bryant was fired from Defendant's gun, he was able to conclude that the test bullet and the bullet which killed Bryant could have been fired from the same gun.

Defendant did not present any evidence at trial. At the charge conference, Judge Locklear informed the parties that the jury would receive instructions on first-degree murder and second-degree

murder. Counsel for Defendant requested an instruction on manslaughter, but chose to stand on the evidence rather than argue the issue. Judge Locklear denied the request and instructed the jury only on first-degree murder and second-degree murder. Defendant made no objection.

From his conviction of second-degree murder and sentence of 189 to 286 months in prison, Defendant appeals.

Discussion

I. Denial of request for instruction on voluntary manslaughter

Defendant argues the trial court erred by denying his request for a jury instruction on voluntary manslaughter. Because Defendant failed to object to the trial court's jury charge, our review of the court's instructions is limited to plain error. N.C. R. App. P. 10(b)(2), (c)(4).

In criminal appeals, plain error review is available for challenges to jury instructions and evidentiary issues. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, . . . it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnote call numbers omitted), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)). "[T]he test for plain

error places a much heavier burden upon the defendant than that imposed . . . upon defendants who have preserved their rights by timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal quotation marks omitted).

Judge Locklear's instructions to the jury defined second-degree murder as "the unlawful killing of a human being with malice, but without premeditation and deliberation." Voluntary manslaughter is a lesser included offense of second-degree murder and is defined as "the unlawful killing of a human being *without* malice and without premeditation and deliberation." *State v. Tidwell*, 323 N.C. 668, 673, 374 S.E.2d 577, 580 (1989) (emphasis added); *State v. Holcomb*, 295 N.C. 608, 613, 247 S.E.2d 888, 891 (1978). Defendant argues that the trial court's denial of his request for an instruction on voluntary manslaughter forced the jury to choose between either (1) convicting Defendant of second-degree murder although the jury did not find malice to be present, or (2) allowing Defendant to go unpunished by returning a verdict of not guilty. This sort of coercion, Defendant argues, is plain error in that the jury would have likely found Defendant guilty of voluntary manslaughter had they been presented the option. Defendant's argument is based on the assumption that the jury found no malice in the killing. We are not persuaded.

Absent any contrary evidence, malice may be presumed upon proof beyond a reasonable doubt of homicide by the intentional use of a deadly weapon. *State v. Hester*, 111 N.C. App. 110, 117, 432 S.E.2d 171, 175 (1993). For the jury to have found no malice in

Defendant's killing of Bryant, the jury would have had to find either (1) that intentional use of a deadly weapon was not proved beyond a reasonable doubt, or (2) that evidence of just cause, excuse, or justification was presented sufficient to rebut the presumption of malice. *See State v. Simpson*, 303 N.C. 439, 451, 279 S.E.2d 542, 550 (1981).

The overwhelming evidence in this case tended to show that Bryant's death was proximately caused by the Defendant's leaning out the window of the vehicle and intentionally discharging his weapon at the persons on the porch at 305 South Seneca Street. This evidence was sufficient to raise the inference that the killing was done with malice. *See State v. Ford*, 297 N.C. 144, 150-51, 254 S.E.2d 14, 18 (1979). Further, no evidence was presented tending to support any justification or excuse for the shooting; rather, Defendant argued at trial that he was not the shooter. This evidence did not reach the issue of malice and, as such, no evidence existed to support the lesser included offense of voluntary manslaughter. *Ford*, 297 N.C. at 151, 254 S.E.2d at 19.

Without evidence to support a charge of manslaughter, a trial court may correctly submit to the jury as possible verdicts guilty of first-degree murder, guilty of second-degree murder, and not guilty, *State v. Hampton*, 294 N.C. 242, 251, 239 S.E.2d 835, 841 (1978), as the trial court here did. We therefore hold that the trial court did not err, much less commit plain error, in denying Defendant's request for an instruction on manslaughter.

II. Foundation for evidence of tracking dog's actions

Defendant next argues the trial court erred in allowing testimony about a police dog tracking Defendant without first requiring a foundation to be laid regarding the dog's qualifications as a tracker. As Defendant failed to object to the presentation of this evidence at trial, again this court may only review this evidentiary issue for plain error. N.C. R. App. P. 10(b)(1), (c)(4). Before deciding that an action by the trial court amounts to plain error, "the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Jones*, 176 N.C. App. 678, 682, 627 S.E.2d 265, 268 (2006). In reviewing this issue for plain error, we note at the outset that introduction of evidence of this type without adequate foundation is generally not the "type of exceptional case where we can say that the claimed error is so fundamental that justice could not have been done." *Id.* at 684, 627 S.E.2d at 269 (quoting *State v. Cummings*, 352 N.C. 600, 620-21, 536 S.E.2d 36, 51-52 (2000), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001)).

Defendant's argument is based on the following rule announced in *State v. McLeod*, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929):

> It is fully recognized in this jurisdiction that the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under

> such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

This holding has been modified to allow evidence of the actions of other tracking dogs, not solely bloodhounds, as long as the remaining requirements are satisfied. *State v. Green*, 76 N.C. App. 642, 645, 334 S.E.2d 263, 265, *disc. rev. denied*, 315 N.C. 187, 340 S.E.2d 751 (1985).

In the usual case, a tracking dog's actions are presented at trial as evidence identifying the defendant as the perpetrator of the crime in question. *See State v. Irick*, 291 N.C. 480, 485, 231 S.E.2d 833, 844 (1977); *McLeod*, 196 N.C. at 543, 146 S.E. at 410. Generally, the evidence shows that a dog was given a scent from the crime scene and, after tracking the scent, the dog identified a person matching that scent. *See Irick*, 291 N.C. at 485, 231 S.E.2d at 844; *McLeod*, 196 N.C. at 543, 146 S.E. at 410. From such evidence arise the reasonable inferences that it is more probable the defendant was at the crime scene, and, ultimately, that it is more probable the defendant committed the crime. *See State v. Moore*, 129 N.C. 494, 501-02, 39 S.E. 626, 628-29 (1901) (finding that evidence matching a scent from the crime scene to the defendant may, if presented along with proper foundation, provide a circumstance which tends to connect defendant with the crime of which he is accused). In light of the great weight a jury may attach to the tracking dog's instinctive, scent-based identification, the purpose of the required foundation is to ensure

that the dog's tracking ability can justify the inferences which its identification suggests. *See id.* at 500, 39 S.E. at 628.

In the present case, there was no danger the jury would make an unjustified inference of Defendant's guilt based on the canine handler's testimony. It was the surveillance of the Jacobs' residence, rather than the tracking dog, which first alerted officers to the presence of suspects in the wooded area. Also, it was Defendant who identified himself to the officers as the object of the tracking dog's search.

Moreover, Hunt and Jones identified Defendant as the party responsible for the Seneca Street shooting. The feat of the dog following the "riffs" of Defendant through the woods only explained the officers' actions in the woods and provided no relevant evidence tending to show Defendant's guilt. *See State v. Rowland*, 263 N.C. 353, 360, 139 S.E.2d 661, 666 (1965).

Further, Defendant's argument that it was plain error to admit evidence of the handgun because it was attributable to the tracking dog is similarly unpersuasive. LPD was aware suspects were in the woods, Defendant identified himself as the object of the manhunt, and the handgun was recovered later without the assistance of a tracking dog.

Clearly, evidence of the actions of the tracking dog could not have brought about the result in this case. *See id.* at 361, 139 S.E.2d at 666. Where complained-of evidence cannot be shown to have caused the jury to convict the defendant, plain error cannot exist. *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987),

cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988). Accordingly, Defendant's assignment of error is overruled.

NO ERROR.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

Report per Rule 30(e).