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NO. COA08-65

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 05 CRS 067217

LERANDELL TERRANCE SIMMONS

Appeal by defendant from judgments entered 14 February 2007 by Judge R. Allen Haddour in Cumberland County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover for defendant.

ELMORE, Judge.

Lerandell Terrance Simmons (defendant) appeals from judgments entered upon jury verdicts finding him guilty of first degree murder, first degree burglary, and possession of firearm by felon. Defendant was charged with first degree murder under the felony murder rule, with first degree burglary by breaking and entering as the underlying felony. For the reasons stated herein, we find no error.

At trial, the State's evidence tended to show that in the early hours of 27 October 2005, Deputy Sheriff Manning of the Cumberland County Sheriff's Office responded to a shooting at the

Topeka Heights apartment complex in Cumberland County. Deputy Sheriff Manning entered Miranda Bryant's (Ms. Bryant) second-floor apartment and found Johnny Davis (Mr. Davis) lying on the floor unconscious, but apparently alive, bleeding from the head. Mr. Davis died shortly after. At trial, the medical examiner testified that a bullet was found during the autopsy in Mr. Davis's left temple, which was the cause of his death. A second bullet wound was also found on Mr. Davis's upper left arm. Both of the wound entry points had stippling indicating that the gun that fired the bullets was fired at close range, most likely within twenty-four inches or closer. No soot was found around either of the wounds, indicating that neither was a contact wound.

At trial, Ms. Bryant testified that she and defendant had an on-again, off-again relationship dating back to approximately 1992. Ms. Bryant was the mother of two of defendant's children, L.T.S. and T.S. Ms. Bryant had two other children, J.C. and D.B.; however, defendant referred to them as his stepchildren and they called him "Dad." Both Ms. Bryant and defendant testified that during their relationship they would often have late night and early morning unannounced sexual encounters. There is some dispute as to how defendant would enter her apartment for these rendezvous: defendant testified that Ms. Bryant had given him a key and was allowed to enter her apartment at will; Ms. Bryant testified that he would enter her apartment uninvited and without a key. Ms. Bryant testified that her apartment door could be unlocked from the

outside using a credit card. She also indicated that at or around the time of the incident, her house keys could not be located.

Ms. Bryant testified that Mr. Davis had been her boyfriend since April 2004. Ms. Bryant later indicated that there was a hostile relationship between defendant and Mr. Davis dating back to an incident in February 2005. At a birthday party for J.C., defendant confronted Ms. Bryant about "talking to" another man. When the argument escalated and involved another female party guest, Mr. Davis intervened. Testimony corroborated by multiple witnesses indicated that Mr. Davis had told defendant not to "rough handle" a woman and that defendant should "step outside" and Mr. Davis would "handle him." Mr. Davis pulled out a gun, gave it to a friend, and stated that they "need[ed] to step outside." Ms. Bryant testified that as the situation was diffused, defendant said "[t]hat this wasn't over and he'll see him." At that time, Ms. Bryant effectively ended her relationship with defendant.

Ms. Bryant testified that, later in August 2005, defendant went to Ms. Bryant's apartment to reconcile. However, as Ms. Bryant rebuffed defendant's attempts, Mr. Davis pulled up to her apartment in his gray Jeep. Ms. Bryant testified that she thought that defendant could, through a kitchen window, see Mr. Davis pull his Jeep into the parking lot, exit the car, and walk towards her apartment. Defendant testified that his back was to the window and thus he did not see Mr. Davis drive up, and that he had never seen Mr. Davis's car.

After a late-night party at her home on 27 October 2005, Ms. Bryant testified that, on the morning of the incident at approximately 2:30 a.m., she received a phone call from defendant. Party guests testified that when they left between 3:00 and 3:30 a.m., Ms. Bryant was still on the phone with defendant. During the conversation, Ms. Bryant did not inform Mr. Davis that she was talking to defendant because of the previous animosity between the two. The testimony of Ms. Bryant and defendant conflict as to the content of the telephone call. Ms. Bryant testified that defendant asked if he could come over and she rebuffed him, explaining that she had company at the apartment and they were playing cards and drinking. She testified that defendant asked her to call him if Mr. Davis showed up at the party. She would not tell him who was at her apartment. Defendant testified that he told Ms. Bryant that he would be unable to come to her apartment that night because he had no transportation. He testified that told her that he would call her if anything changed. After the party guests left, Ms. Bryant and Mr. Davis went upstairs to bed and went to sleep.

Defendant, Ms. Bryant, and J.C. all testified as to the events that transpired when defendant arrived at Ms. Bryant's apartment in the early morning hours of 27 October 2005.

J.C.'s testimony indicated the following: A knock on the front door woke J.C. and he heard defendant coming up the stairs, calling for Ms. Bryant. J.C.'s bedroom door was ajar and she saw the events transpire through the opening. When defendant reached the top of the stairs, Mr. Davis came out of the bedroom and asked

defendant why he was there. Defendant replied he was there to see his kids and Mr. Davis told defendant that Ms. Bryant did not want him there. After a short argument, Mr. Davis slapped defendant. As defendant stumbled backwards, he pulled a gun from his pocket and shot Mr. Davis in the left arm. Defendant stated that this was self defense and Mr. Davis "shouldn't never hit me in my throat." As Mr. Davis stumbled backwards into the wall grabbing his left arm with his right, defendant shot him again, this time in the head. Mr. Davis fell to the hallway floor and defendant told J.C. to call 911 because Mr. Davis was "leaking."

Ms. Bryant's testimony indicated the following: Mr. Davis shook her awake at about 5:00 a.m., stating her sister was downstairs knocking on the door. Ms. Bryant's sister would usually drop her boyfriend off at his job each day and then go to Ms. Bryant's apartment to give her a ride to work. Ms. Bryant realized that it was too early for her sister to be stopping by. Ms. Bryant's telephone then rang; when she answered, defendant replied by calling her name. After hanging up, Mr. Davis arose, went to the window, and then said "Let me go ahead and handle this n----r." Ms. Bryant heard the front door open and defendant calling out her name as he came up the stairs. Prior to Mr. Davis leaving the bedroom, Ms. Bryant did not see him grab a gun. Mr. Davis left the bedroom into the hallway shouting at defendant. Ms. Bryant could not see into the hallway; she could only see the back of Mr. Davis's head. Mr. Davis told defendant that Ms. Bryant did not want him there. Defendant replied that he only wanted to see his

kids. Ms. Davis then heard a loud pop and saw a flash of light. Defendant then stated, "he shouldn't never touched me. He shouldn't never touched me. Why did he have to touch me? All I want to do is see my kids." Ms. Bryant did not hear defendant make any statements regarding self defense. After later exiting the bedroom, Ms. Bryant did not see a gun near either Mr. Davis or defendant.

Defendant's testimony indicated the following: When calling Ms. Bryant, defendant told her that he was on his way to her apartment. Once he arrived, defendant was able to get into Ms. Bryant's apartment with his key. As he entered and was going upstairs, defendant called out to Ms. Bryant, "Wifey, I'm home." Mr. Davis then stepped out of Ms. Bryant's bedroom saying that he had no wife here. Defendant was unaware that Mr. Davis was in the apartment until this time. Mr. Davis asked defendant how he had entered the apartment, and defendant replied that he had a key. Mr. Davis demanded the key, but defendant refused, saying that Ms. Bryant would have given Mr. Davis a key if she wanted him to have one. Defendant told Mr. Davis he wanted to see his kids and then he would leave. As defendant turned to walk away, Mr. Davis hit defendant in the back, and he went down to his knees. When he got up, Mr. Davis grabbed him, and defendant saw Mr. Davis reach behind his back. Mr. Davis came back like he was going to hit him with something and that is when defendant saw a gun. The two then began struggling for the gun; however, it fired while in Davis's hand. Defendant then kned Mr. Davis in the groin and the gun fired a

second time. Both fell backwards and defendant could see Mr. Davis lying on the floor and bleeding. Defendant called J.C. and told her that the gun had gone off and he thought that Mr. Davis was hit.

On 30 January 2006, true bills of indictment were returned charging defendant with first degree murder of Mr. Davis and first degree burglary. A third true bill of indictment was later returned on 31 July 2006 charging defendant with possession of a firearm by felon. In the 11 January 2007 administrative session of Cumberland County Superior Court before the Honorable Judge E. Lynn Johnson, the trial court ordered that defendant's three charges be joined and tried before a jury at the same time. Defendant was tried during the 29 January 2007 criminal session of Cumberland County Superior Court before the Honorable Judge R. Allen Baddour with judgment and commitment entered on 14 February 2007. Defendant was convicted on all counts and was sentenced to life imprisonment without parole for the first degree murder charge and a consecutive term of 103 to 133 months' imprisonment for the first degree burglary and possession of firearm by felon charges. Defendant filed notice of appeal on 14 February 2007.

I.

Defendant's first assignment of error is that the evidence, viewed in the light most favorable to the State, was insufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant had committed first degree burglary or first degree

felony murder with burglary as the underlying felony. We do not agree.

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (quotations and citations omitted). "The evidence offered by the State must be taken to be true and any contradictions and discrepancies therein must be resolved in its favor." *State v. Evans*, 279 N.C. 447, 453, 183 S.E.2d 540, 544 (1971) (citations omitted). The evidence—whether direct, circumstantial, or both—must lead a reasonable mind to accept it as adequate to support a conclusion. *State v. Montgomery*, 341 N.C. 553, 561, 461 S.E.2d 732, 735 (1995). When viewed in this manner, the evidence must convince a juror beyond a reasonable doubt that the State has established each essential element of the offense charged and that the defendant is the perpetrator of that offense. *Id.* at 560, 461 S.E.2d at 735.

A. First degree Murder

"First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993) (citations omitted). These enumerated felonies include "arson, rape or a sex offense, robbery,

kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]” N.C. Gen. Stat. § 14-17 (2007).

For felony murder, “there need not be a ‘causal relationship’ between the underlying felony and the homicide, only an ‘interrelationship.’” *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 724 (1994). “In felony murder, the killing may, but need not, be intentional. There must, however, be an unbroken chain of events leading from the attempted felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction.” *Gibbs*, 335 N.C. at 51-52, 436 S.E.2d at 350 (quotations and citations omitted).

As such, the guilt of an accused under the felony murder rule is contingent upon a jury finding the defendant guilty, beyond a reasonable doubt, of killing during the perpetration or attempted perpetration of the underlying felony. In the case at hand, defendant was charged with first degree burglary as well as first degree murder by way of felony murder and possession of a firearm by a felon. In order for this Court to uphold defendant’s convictions and find no error, the State must have provided sufficient evidence at trial to establish beyond a reasonable doubt that defendant committed first degree burglary or first degree felony murder with burglary as the underlying felony.

B. First Degree Burglary

In light of these principles, we examine the evidence relating to the charge of first degree burglary. “The elements of

first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996) (citations omitted); N.C. Gen. Stat. § 14-51 (2007).

The indictment for first degree burglary in the present case alleged that defendant broke and entered with the intent to commit a felony therein. The indictment was silent as to what particular felony defendant intended to commit at the time of breaking and entering. However, during the jury instruction conference, the State informed the trial court that it wanted the jury to be instructed on felony assault with a deadly weapon inflicting serious injury to satisfy the underlying felony requirement. As such, it became incumbent on the State to prove beyond a reasonable doubt that defendant had intended to commit an assault with a deadly weapon inflicting serious bodily injury at the time of the breaking and entering.

Defendant contends that the State failed to carry its burden of proof regarding felonious intent, which would result in defendant being found guilty of the lesser included offense of non-felonious breaking or entering. Defendant does, however, concede that the evidence presented by the State was sufficient to permit a reasonable juror to find all other elements of first degree burglary.

It is a well-recognized principle that "a judge must declare and explain the law arising on all of the evidence." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981) (citation omitted). "[T]his duty necessarily requires the judge to charge upon a lesser included offense, even absent a special request therefor, whenever there is some evidence to support it." *Id.* (citations omitted). In its instructions, the trial court instructed the jury on first degree burglary, second degree burglary, felonious breaking and entering, the lesser included offense of non-felonious and breaking or entering.

Defendant asserts that there was a lack of evidence presented at trial to establish that he intended to assault Mr. Davis with a deadly weapon inflicting serious bodily injury at the time he entered Ms. Bryant's apartment.

Although the evidence established that defendant shot Mr. Davis, defendant argues that what actually happened after his entry into the apartment was not the determinative reference point for establishing the felonious intent for burglary. Although defendant acknowledges that "[t]he intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house," he argues that his case is an exception to that proposition. *State v. Tippett*, 270 N.C. 588, 594, 155 S.E.2d 269, 274 (1967) (quotations and citation omitted)

Defendant puts forth the following arguments to establish a lack of felonious intent: (i) it was not unusual for him to enter Ms. Bryant's apartment using a key late at night or early in the

morning unannounced for sexual encounters and (ii) there was no evidence presented that defendant either knew Mr. Davis was in the bedroom with Ms. Bryant or sought out Mr. Davis after he entered the apartment. We find these arguments unpersuasive.

After reviewing the record and transcript, it is clear that, when considered in the light most favorable to the State, the evidence was sufficient to find defendant guilty of the greater offense of first degree burglary via assault with a deadly weapon inflicting serious bodily injury at the time of the breaking and entering.

Mr. Davis and defendant had a hostile relationship prior to the killing; evidence tended to show that defendant had likely seen Mr. Davis's Jeep before and recognized it parked outside Ms. Bryant's apartment the morning of the killing; Ms. Bryant told defendant not to come over that morning; defendant had a history of entering Ms. Bryant's apartment uninvited and opening her door without a key; defendant fled the apartment after the shooting and did not turn himself into police immediately; and defendant was known to carry a gun.

When taken in the light most favorable to the State, these facts support the conclusion that when defendant unlawfully entered Ms. Bryant's apartment, he was armed and intended to use his weapon upon Mr. Davis to inflict serious bodily injury. All evidence tended to show that Mr. Davis was killed during the perpetration of a felony, namely first degree burglary via assault with a deadly weapon inflicting serious bodily injury at the time of the breaking

and entering. As such, the State provided sufficient evidence and carried its burden of proof. We overrule defendant's first assignment of error.

II.

Defendant's second assignment of error contends that the trial court erred by instructing the jury that inflicting a lethal wound after the victim was felled was a circumstance from which the jury could infer premeditation and deliberation. Defendant argues that this instruction was not supported by the evidence and the prejudice suffered because of the trial court's instruction entitles him to a new trial. We do not agree.

A trial court's jury instruction is for the guidance of the jury. Furthermore, the purpose is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict. In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented. A judge has the obligation to instruct the jury on every substantive feature of the case.

State v. Smith, 360 N.C. 341, 346-47, 626 S.E.2d 258, 261 (2006) (quotations and citations omitted). "[W]here the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous." *State v. Freeman*, 185 N.C. App. 408, 419, 648 S.E.2d 876, 884 (2007) (quotations and citations omitted).

Over defendant's objection, the trial court gave the following instruction regarding premeditation and deliberation for purposes of first degree murder:

Neither premeditation nor deliberation is usually susceptible of direct proof. They may—they may be proved by circumstances from which they may be inferred; such as, the lack of provocation by the victim; conduct of the defendant before, during and after the killing; threats and declarations of the defendant; use of grossly excessive force; infliction of lethal wounds after the victim is felled; brutal or vicious circumstances of the killing; manner in which or means by which the killing was done; or ill will between the parties[.]

(Emphasis added.)

Defendant contends that the State presented no evidence of any infliction of lethal wounds after the victim was felled and, as a result, the jury was allowed to infer premeditation and deliberation for purposes of first degree murder via felony murder from factors unsupported by evidence. We do not agree.

As defendant concedes, the jury instruction is quoted directly from the North Carolina Pattern Jury Instructions (N.C.P.I. Crim. 206.10) and is a correct statement of existing North Carolina law. "The elements listed are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990) (citation omitted).

The North Carolina Supreme Court has held that a jury instruction such as the

instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred. The instruction tells jurors that they 'may' find premeditation and deliberation from certain circumstances, 'such as' the circumstances listed. The instruction does not preclude a jury from finding premeditation and deliberation from direct evidence or other circumstances; more importantly, it does not indicate to the jury that the trial court is of the opinion that evidence exists which would support each or any of the circumstances listed. Therefore, the trial court did not err by giving the instruction at issue here, even in the absence of evidence to support each of the circumstances listed.

State v. Leach, 340 N.C. 236, 241-42, 456 S.E.2d 785, 789 (1995). In *Leach*, the Supreme Court went further and overruled prior case law requiring evidence of a felling of the victim prior to its inclusion among the various circumstances indicative of premeditation and deliberation. *Id.* at 242, 456 S.E.2d at 789 (citing *State v. Buchanan*, 287 N.C. 408, 420-22, 315 S.E.2d 80, 87-88 (1975)).

Based on our review of the transcript and record in this case, sufficient evidence supports the inclusion of the felled jury instruction. J.C.'s testimony, corroborated by the findings of the medical examiner, indicate that Mr. Davis was shot in both the left temple and upper left arm. Although defendant contends that there is no evidence to support the inference that Mr. Davis had already been felled when the lethal wound was inflicted, the Supreme Court

has held that when multiple gunshot wounds are present, the victim is considered legally felled after the first shot regardless of the number of wounds. *State v. Austin*, 320 N.C. 276, 357 S.E.2d 641 (1987). The *Austin* Court reasoned that for the gun to be fired,

the trigger must be consciously pulled for each shot. Even though the [gun] is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger. There is no evidence as to how much time passed between the shots. The fact that there was no evidence adduced at trial concerning either the sequence of the shootings or the sequence of the wounds is not relevant to a determination of this issue; the premise of the "felled victim" theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one shot to the next.

Id. at 295, 357 S.E.2d at 653. As such, we find that the State presented sufficient evidence as to premeditation and deliberation, and we hold that the trial court did not err in so instructing the jury.

Defendant received a fair trial free from error.

No error.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).