NO. COA08-676

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

STATE OF NORTH CAROLINA

v. Franklin County
No. 05 CRS 50157

ANTONIE PERRY

Appeal by defendant from judgment entered 14 December 2007 by Judge Ripley E. Rand in Franklin County Superior Court. Heard in the Court of Appeals 4 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Duncan B. McCormick, for the defendant-appellant.

STEELMAN, Judge.

The trial court did not err in declining to instruct the jury on voluntary manslaughter because there was no evidence of adequate provocation under the law. Where there was evidence that defendant was in a car leaving the scene at a high rate of speed and taken into custody some hours later, the trial court properly instructed the jury on flight.

I. Factual and Procedural Background

On 15 January 2005, Bunn High School defeated its basketball rival, Louisburg. Jake Thorne, a graduate of Bunn High, hosted a victory party at his family's home. The party started shortly

after the game ended. Antoine Perry (defendant), Charles Mayo, Stephen Campbell, and Eliot Hazelwood, all Louisburg residents, arrived at the party in Mayo's burgundy Mitsubishi Galant around midnight. There were over a hundred people at the party.

Inside the residence, Marquita Thorne felt something hard inside of defendant's jacket while they were dancing. Defendant said that it was a gun. With Mayo's help, Marquita convinced defendant that he could not stay inside the house with the gun. Defendant put the gun in Mayo's car and returned to the party. Subsequently he objected to someone "bumping" his cousin. Jake Thorne intervened and told defendant not to cause problems. Defendant then hit Thorne. A fight ensued, starting inside the residence and moving outside as other people got involved. When he broke away, defendant ran to the burgundy car and retrieved the gun. Shots were fired into the air, and the gun jammed. One of defendant's friends unjammed the gun. Defendant was seen with the gun before he got into Mayo's vehicle and left the party. After driving away, Mayo drove back in front of the residence before leaving the neighborhood. Defendant fired the gun into the crowd. A bullet hit Marc Phillipeaux, who subsequently died.

Detective Strickland of the Franklin County Sheriff's Department was the on-call investigator on the night of the shooting and responded. At an intersection several miles from the party, he saw several cars approaching at a high rate of speed. Detective Strickland identified one of the cars as a burgundy Mitsubishi Galant, and recognized the driver as Charles Mayo.

Police subsequently located the Galant at the apartment of defendant's girlfriend in Louisburg. Defendant was taken into custody that morning. Three days later, defendant's cousin led police to the gun, which had been thrown out of the car alongside a road.

Defendant was indicted on one count of first-degree murder. Defendant pled not guilty and was tried before a jury at the 10 December 2007 Criminal Session of Superior Court, Franklin County. Defendant's motion to dismiss at the close of the State's evidence was denied. Defendant offered no evidence. The trial court submitted charges of first-degree murder, second-degree murder, and not guilty to the jury, which returned a verdict of second-degree murder. Defendant was sentenced from the presumptive range to an active sentence of 157 to 198 months. Defendant appeals.

III. Standard of Review

Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. *See, e.g., State v. Ligon*, 332 N.C. 224, 241-242, 420 S.E.2d 136, 146 (1992) (instruction on voluntary manslaughter); *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990) (instruction on flight). Once a defendant has shown error, an appellate court also reviews the record *de novo* to determine whether defendant has established prejudice. N.C. Gen. Stat. § 15A-1443(a); *State v. Weaver*, 123 N.C. App. 276, 286, 473 S.E.2d 362, 368, *disc. rev. and cert. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996).

IV. Analysis

A. Voluntary Manslaughter

In his first argument, defendant contends that the trial court erred in declining to instruct the jury on voluntary manslaughter. We disagree.

"Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under [1] the influence of some passion or [2] heat of blood produced by adequate provocation." *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 115 S. Ct. 1708, 131 L. Ed. 2d 569, *overruled on other grounds*, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). "[H]eat of passion suddenly aroused by provocation must be of such nature as the law would deem adequate to temporarily dethrone reason and displace malice." *State v. Montague*, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979) (citations omitted). In order to be entitled to such an instruction based upon the excuse of provocation, "there must be evidence that: (1) defendant shot [the victim] in the heat of passion; (2) this passion was provoked by acts of the victim which the law regards as adequate provocation; and (3) the shooting took place immediately after the provocation." *State v. Ligon*, 332 N.C. 224, 241-242, 420 S.E.2d 136, 146 (1992) (citing *State v. Weeks*, 322 N.C. 152, 173, 367 S.E.2d 895, 908 (1988)). In *Ligon*, defendant similarly contended that the evidence established "that he acted in the heat of passion upon adequate provocation." The Supreme Court concluded that Ligon shot the victim because the

victim stole his cocaine, which was held to be "hardly what the law regards as 'adequate provocation.'" *Id.* at 242, 420 S.E.2d at 146.

As in *Ligon*, defendant contends that the State's evidence showed that he was the victim of criminal behavior, and that this was sufficient to establish provocation. Defendant asserts that he was the victim of a brutal beating by several persons at the party and that the beating constituted provocation that was transferable to his shooting of Phillipeaux. Even "accepting defendant's version of the evidence as accurate," *id.* at 241, 420 S.E.2d at 146, we cannot say that defendant shot Phillipeaux in the heat of passion upon adequate provocation. There was no evidence that Phillipeaux was anything but an innocent bystander to the alleged assault upon defendant. No one suggested that Phillipeaux participated in the affray or that he had any interaction with defendant. Nor was there evidence that anyone aside from defendant was armed. Defendant precipitated the affray by his unprovoked punching of Thorne. The fact that defendant ultimately got the worst of the fight does not constitute a sufficient provocation for defendant to wantonly discharge a firearm into a crowd of innocent bystanders. This is "hardly what the law regards as 'adequate provocation.'" *Id.*; *see also State v. Boon*, 82 N.C. 637, 650 (1880) ("in considering whether the killing amounts to manslaughter or murder, the instrument with which the homicide was committed must be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter.").

Nor do these facts support the immediacy requirement of *Montague*, 298 N.C. at 757, 259 S.E.2d at 903. Defendant and his friends left the party and drove away before returning to the area and shooting into a crowd. Such a shooting is neither sudden or immediate in regard to the alleged provocation.

Defendant relies upon *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971), and *State v. Ramirez*, 156 N.C. App. 249, 256-57, 576 S.E.2d 714, 720, *rev. denied*, 357 N.C. 255, 583 S.E.2d 286, *cert. denied*, 540 U.S. 991 (2003), for the premise that provocation by those who beat him is transferable to Phillipeaux, the victim of the shooting, to excuse defendant's conduct. Having determined that there was no adequate or sudden provocation for his actions, we need not reach this argument.

This assignment of error is without merit.

B. Instruction on Flight

In his second argument, defendant contends that the trial court erred in instructing the jury on flight because the evidence showed that defendant merely left the scene. We disagree.

In *State v. Lloyd*, 354 N.C. 76, 552 S.E.2d 596 (2001), our Supreme Court stated:

> A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. However, mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

Id. at 119, 552 S.E.2d at 625 (internal quotations and citations omitted). We review the trial court's decision *de novo*. *Levan*, 326 N.C. at 164-65, 388 S.E.2d at 435.

Defendant argues that the State's evidence demonstrates that he merely left the scene to return to Louisburg and was "easily found" at his girlfriend's apartment. Even when viewed in the light most favorable to him, the evidence shows that defendant did more than merely leave the scene of the crime. *See Lloyd*, 354 N.C. at 119, 552 S.E.2d at 625. The State's evidence showed that defendant rode in a car that was traveling at a high rate of speed away from the scene of the shooting. When investigators were admitted to the girlfriend's apartment, defendant was not present. The gun used in the shooting was recovered outside the fence line of a cow pasture. From this evidence, a jury could conclude that defendant sought to avoid apprehension and to hide the weapon. We hold that the State's evidence was sufficient to meet the standard set forth in *Lloyd*, 354 N.C. at 119, 552 S.E.2d at 625, and the trial court did not err in instructing the jury on flight.

This argument is without merit.

IV. Conclusion

Where defendant has not shown error by the trial court, we need not determine prejudice.

NO ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).