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NO. COA08-743

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v. | Wayne County
Nos. 06 CRS 51809,06 CRS 8433

Basher Elijah Baker

Appeal by defendant from judgment entered 31 January 2008 by Judge Ripley Eagles Rand in Wayne County Superior Court. Heard in the Court of Appeals 26 January 2009.

Court of Appeals

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

PARRISH, COOKE & CONDLIN, by *James R. Parrish, for defendant-appellant.*

Slip Opinion

BRYANT, Judge.

On 31 January 2008, a jury found defendant guilty of second degree murder and possession of a firearm by a felon. The trial court entered judgment and commitment according to the verdicts and sentenced defendant to consecutive terms of 189 to 236 months and 15 to 18 months in the custody of the North Carolina Department of Correction. For the reasons stated below, we hold the trial court committed no prejudicial error.

At trial, twenty-three year old Christina Starky testified that she had dated the victim Octavius Manley on and off since the tenth grade. At the time of trial, she had three children. Manley

fathered the first but was not the father of the second. Still, Manley provided money and other things for the children. In January 2004, Starky was pregnant with her third child. Because around the time of conception she was involved with both Manley and defendant, she could not be sure which of the two was the father. Starky told Manley about her concerns.

On 25 February 2006, Manley came to Starky's apartment and discovered defendant's clothes and personal items. An argument ensued, after which Starky got into her car and left. Soon, Starky saw defendant walking and pulled over to inform him that Manley was at her apartment, that Manley was upset, and that he had thrown defendant's personal items in a dumpster.

Starky left defendant and drove back to her apartment to warn Manley that "[defendant's] mad and [he was] coming to [Starky's] apartment." Manley and Starky got into Starky's car and began to drive away when Starky saw defendant with four or five guys. Watching defendant running after the car through her rearview mirror, Starky drove through an intersection and was struck by another vehicle. No one was injured. But, after Starky pulled her vehicle to the curb, Manley got out and walked away. Defendant and the others soon arrived and followed Manley.

Donta Broadhurst, who was with defendant, testified that after the collision, defendant and his friends caught up with and surrounded Manley. Manley asked defendant for a fair fight and then struck first. Broadhurst testified that defendant shot

Manley. But, after the first shot, Broadhurst ran. He heard three shots. Manley died as a result of multiple gunshot wounds.

Defendant testified he knew Manley had thrown defendant's personal items in a dumpster. Defendant further testified that Starky informed him that Manley would not leave her apartment and that "he might have a knife." After Starky drove away, defendant met a group of guys he knew. They talked and started walking together. When Starky drove by a second time, with Manley in the car, defendant followed because he "wanted to know why, why [his] stuff was thrown out[.]"

When defendant and his companions caught up with Manley, Manley stated he wanted a one-on-one fight with defendant. Defendant thought about Starky's warning about a knife; so he retrieved a gun from Broadhurst and placed it in his pants pocket. Defendant testified the gun was only "to protect [himself] if [he saw] a knife." While they wrestled, defendant saw a knife in Manley's hand. Defendant tried to pull the gun from his pants, and it went off striking Manley in the leg. Defendant did not recall a second shot. According to defendant, Manley "went low and grabbed his, grabbed his leg." Defendant then ran away.

A forensic pathologist who performed Manley's autopsy testified that Manley was shot once in the leg from farther away than six inches and once in the chest, with a gun muzzle within six inches if not touching the skin.

Officer Michael Horstmann, an investigator with the Goldsboro Police Department, testified that he secured a warrant for

defendant but was not immediately able to locate him. So, he enlisted the aid of the local media through a local paper – the Goldsboro News Argus. Several articles were written about the crime, including "Murder Charge Filed Suspect Sought" and "Crime of the Week" both of which mentioned defendant by name. On 16 July 2006, the police department issued a press release of its "Seven Most Wanted." Officer Horstmann testified defendant was at the top of that list. "[Defendant] was the one we were looking for the most." However, the first information Officer Horstmann received on defendant was six months after the murder.

Officer Horstmann testified that the Elizabeth, New Jersey Police Department "had arrested [defendant] for a drug offense, and during their processing him of that arrest they realized he was wanted in Goldsboro for murder." Defendant was then extradited back to North Carolina.

After the close of the evidence, defense counsel made a motion to dismiss the charge of first-degree murder for insufficient evidence. The trial court denied the motion. The trial court refused defendant's request to instruct the jury on self-defense; however, the trial court did instruct the jury that the doctrine of self-defense did not apply. The jury returned verdicts of guilty on the charges of second degree murder and possession of a firearm by a felon. Defendant appeals.

On appeal, defendant raises five arguments: the trial court erred (I) in failing to dismiss the murder charge; (II) in failing

to instruct on the law of self-defense; and (III) by instructing the jury that defendant was not entitled to self-defense. Defendant argues the trial court committed plain error by (IV) allowing the State to elicit evidence that defendant was on the Goldsboro Police Department's Most Wanted List and (V) that defendant had been arrested in New Jersey for drug offenses.

I

First, defendant argues that the trial court erred in failing to dismiss the charge of second-degree murder due to insufficient evidence. Defendant argues that the evidence fails to support the element of malice. We disagree.

"In ruling upon defendant's motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Jackson*, 145 N.C. App. 86, 89, 550 S.E.2d 225, 229 (2001) (citation omitted). "A motion to dismiss is proper when the State fails to present substantial evidence of each element of the crime charged." *State v. Mangum*, 158 N.C. App. 187, 190, 580 S.E.2d 750, 753 (2003) (citation omitted).

> Substantial evidence consists of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The trial court considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct.

State v. Hargett, 148 N.C. App. 688, 691, 559 S.E.2d 282, 285 (2002) (internal citations and quotations omitted).

"[M]urder in the second degree is the unlawful killing of another with malice and without premeditation and deliberation . . . ." *State v. Smith*, 221 N.C. 278, 290, 20 S.E.2d 313, 321 (1942).

> Malice is not only hatred, ill-will, or spite, as it is ordinarily understood -- to be sure that is malice -- but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. The intentional use of a deadly weapon proximately causing death gives rise to the presumption that (1) the killing was unlawful, and (2) the killing was done with malice.

State v. Myers, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980) (internal citations and quotations omitted). But, the presumption is rebuttable. *State v. Barrett*, 20 N.C. App. 419, 422, 201 S.E.2d 553, 555 (1974).

In *State v. Johnson*, 182 N.C. App. 63, 641 S.E.2d 364, *disc. rev. denied*, 361 N.C. 433, 649 S.E.2d 395 (2007), this Court addressed an appeal from a second degree murder conviction on the basis of insufficiency of the evidence. *Id.* at 69, 641 S.E.2d at 368. There was an altercation between the defendant, the defendant's brother, and two other men outside of a football game. *Id.* at 65-66, 641 S.E.2d at 366. After the defendant's brother was tackled, the defendant pulled out a gun and shot the aggressor. *Id.* at 65, 641 S.E.2d at 366. Another man then tried to wrestle away the defendant's gun, and the defendant shot that man as well. *Id.* at 66, 364 S.E.2d at 366. We held that where the evidence showed the defendant used a deadly weapon, a gun, and intentionally

shot the first victim that "evidence alone [was] sufficient to overcome the required threshold to submit the charge of second-degree murder to the jury." *Id.* at 71, 641 S.E.2d at 369.

Here, Donta Broadhurst testified for the State that he and defendant, along with two other guys, saw Manley in a car on Olivia Street and began chasing him. When the car stopped due to an accident, the guys were one block away. Manley walked away, and the guys followed him up Devereux Street. There Manley was surrounded until defendant arrived. Broadhurst testified that Manley requested a fair fight and struck defendant. Both Manley and defendant were reaching into their pockets during the fight, but defendant reached into his pocket first. Broadhurst testified that he "ain't see no knife," but that defendant shot Manley. Broadhurst ran after the first shot was fired. He heard a total of three shots fired.

This evidence viewed in the light most favorable to the State was sufficient to submit the charge of second-degree murder to the jury. Accordingly, defendant's assignment of error is overruled.

II & III

Next, defendant argues that the trial court erred by denying defendant's request to instruct the jury on the law of self-defense and, moreover, instructing the jury that the doctrine of self-defense did not apply to this case. We disagree.

"This Court has held that a defendant is entitled to a self-defense instruction if there is any evidence in the record from which it can be determined that it was necessary or reasonably

appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm." *State v. Nicholson*, 355 N.C. 1, 30, 558 S.E.2d 109, 130 (2002) (citation and quotations omitted). However, "[a] defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot." *Id.* (citations and brackets omitted).

Here, defendant denied that he fired the weapon to protect himself from death or bodily harm. Defendant testified that "[Manley] had a knife in the hand, so I figured that if I brandished the gun maybe he would have backed off." When asked if he "intend[ed] to shoot [Manley]?" Defendant replied "No." Defendant testified that he tried to pull the gun from his pants. "I couldn't get it out. And I was – I was struggling getting it out and it went off." Then, defendant ran away. He did not recall a second shot.

On these facts it was not error for the trial court to deny defendant's request and to instruct the jury that the doctrine of self-defense did not apply. Accordingly, defendant's assignment of error is overruled.

IV & V

Defendant argues that the trial court committed plain error by allowing the State to elicit evidence that defendant had been named by the Goldsboro Police Department as one of the seven most wanted fugitives and that defendant had been arrested in New Jersey on

drug charges. Defendant argues that the State's evidence was "repetitive and voluminous," inflammatory and irrelevant. We disagree.

> [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 said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the . . . mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Cummings, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (citation and internal quotations omitted).

"An instruction on flight is appropriate where there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime. The relevant inquiry concerns whether there is evidence that defendant left the scene of the crime and took steps to avoid apprehension." *State v. Ethridge*, 168 N.C. App. 359, 362, 607 S.E.2d 325, 327-28 (2005) (internal citations, quotations, and brackets omitted).

Here, Officer Horstmann testified regarding the Goldsboro Police Department's efforts to locate defendant.

> Horstmann: [O]ften times the police department will issue like a Most Wanted List. People they are having a hard time finding, and in this case July 16th, '06, [defendant] was - - the

press release was issued for Goldsboro Police Department's Seven Most Wanted, and [defendant] was one of them.

State: He was actually the first one, was he not?

Horstmann: Correct. He was the one we were looking for the most.

. . .

State: [F]rom whom did [information that defendant had been located] come?

Horstmann: The police department in Elizabeth, New Jersey.

. . .

They had arrested [defendant] for a drug offense, and during their processing him of that arrest they realized he was wanted in Goldsboro for murder.

We hold that even assuming the evidence was more than necessary to show defendant fled to avoid prosecution there was no prejudicial error in the admission of Officer Horstmann's testimony. Accordingly, defendant's assignment of error is overruled.

No prejudicial error.

Chief Judge MARTIN and Judge BEASLEY concur.

Report per Rule 30(e).