NO. COA08-770

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

STATE OF NORTH CAROLINA

v. Wilkes County
No. 05 CRS 50106

STEVEN CRAIG MILLER

Appeal by defendant from judgment entered 28 February 2007 by Judge Robert C. Ervin in Wilkes County Superior Court. Heard in the Court of Appeals 3 December 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Jonathan Babb, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

JACKSON, Judge.

Steven Craig Miller ("defendant") appeals his 28 February 2007 conviction for first degree murder. For the reasons stated below, we hold no error.

In September 2004, Terry Carlton ("Carlton") met with friends and family at Applebee's after his recent release from prison. Defendant was among those attending. Defendant suggested that he and Carlton "go out sometime," but Carlton's wife objected, stating that "that part of his life was over."

On 1 December 2004, Carlton's wife saw her husband and defendant talking quietly in the couple's living room. She was not

happy that defendant was in her home and gave Carlton an "evil look" and walked back to the bedroom. Defendant left a few minutes later. After defendant left, Carlton told his wife that defendant had wanted money from him. Carlton appeared aggravated.

On the morning of 2 December 2004, the Carltons were in bed when they heard a loud vehicle and a knock on the door. Carlton told his wife not to answer the door because it was "Steve" wanting some money. When Carlton's wife looked out the window, she saw defendant pulling out of the driveway in his green truck. Later that afternoon, Carlton's wife overheard her husband talking on the telephone; he seemed to be aggravated. When she asked with whom he had been talking, Carlton told her that it was "Steve" wanting money.

That evening, Carlton went to a fast-food restaurant. Upon his return, he "threw" the food onto the couch and told his wife that "Steve" was outside and that he was going back outside to "take care of him once and for all." Carlton's wife picked up the food and went to the back of the house to get her husband a shirt. She then heard a "pop" and returned to the living room where she heard something hit the front door. When she opened the door, Carlton was lying there, covered in blood.

Defendant was indicted for Carlton's murder on 7 February 2005. A jury found defendant guilty of first degree murder on 26 February 2007. On 28 February 2007, the jury recommended that defendant be sentenced to life imprisonment without the possibility

of parole. Defendant was sentenced on 28 February 2007. He filed written notice of appeal that day.

Defendant first argues that the trial court erred in denying his motion for a mistrial after evidence of a prior murder conviction came before the jury. We disagree.

Whether to grant or deny a mistrial is a decision that rests within the sound discretion of the trial court. *State v. Hurst*, 360 N.C. 181, 188, 624 S.E.2d 309, 316, *cert. denied*, 549 U.S. ___, 166 L. Ed. 2d 131 (2006) (quoting *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991)). The trial court's decision will not be overturned on appeal unless a clear abuse of that discretion is established. *State v. Ward*, 354 N.C. 231, 248, 555 S.E.2d 251, 263 (2001) (citing *State v. Johnson*, 341 N.C. 104, 114, 459 S.E.2d 246, 252 (1995)). A court abuses its discretion when its decision is "'manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Bagley*, ___ N.C. App. ___, ___, 644 S.E.2d 615, 622 (2007) (quoting *State v. Hutchinson*, 139 N.C. App. 132, 137, 532 S.E.2d 569, 573 (2000)) (alteration in original).

Defendant contends that the statement by Toni Walker ("Walker"), one of Carlton's friends, that Carlton had told her that "[defendant] thinks everybody is supposed to be scared of him just because he killed somebody before" was inadmissible hearsay pursuant to Rule 404(b) of the North Carolina Rules of Evidence. He further contends that Walker's statement entitled him to a mistrial.

The State did not elicit the statement from Walker, and was unaware that Walker would make the statement. Immediately after the statement was made, defense counsel objected and the jury was sent out of the courtroom. The jurors were brought back into the courtroom, individually, and the trial court instructed each of them to disregard the statement. The trial court then inquired whether each juror could comply with the instruction. Each juror responded affirmatively.

Jurors are presumed to follow the instructions they are given by the trial court. *State v. Lewis*, 147 N.C. App. 274, 280, 555 S.E.2d 348, 352 (2001) (citations omitted). Having given the curative instruction, the trial court's decision to deny a mistrial was not "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Bagley*, ___ N.C. App. at ___, 644 S.E.2d at 622. Therefore, defendant's argument is overruled.

Defendant next argues that the trial court erred in allowing the State to build its case upon victim-hearsay. We disagree.

This Court reviews evidentiary rulings according to an abuse of discretion standard. *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004) (citing *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990)). Pursuant to Rules 801 and 802 of the North Carolina Rules of Evidence, a declarant's out-of-court statements are inadmissible to prove the truth of the matter asserted therein. N.C. Gen. Stat. § 8C-1, Rules 801, 802 (2007). However, when the same out-of-court statements are offered as

evidence of the declarant's then existing state of mind, emotion, sensation, or physical condition – such as intent, plan, motive, design, mental feeling, pain, and bodily health – they are admissible pursuant to an exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(3) (2007).

Defendant objected to evidence that (1) Carlton told his wife that defendant wanted money and that he was going outside to "take care of him once and for all;" (2) Carlton's son heard his father tell defendant he would not give defendant money; (3) Carlton told Walker that defendant was "trying to pump [him], trying to say [he] owe[d defendant] money;" and (4) Carlton told Bill Simpson, one of his close friends, that defendant was bothering him – coming to his house, calling his cell phone, and not leaving him alone – about defendant borrowing money. With each statement, the jury was instructed not to consider it for its truth, but for the purpose of explaining Carlton's state of mind.

"It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant." *State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996) (citations omitted). All of the statements at issue illustrate the state of Carlton's mind with respect to the nature of his relationship with defendant. Therefore, we cannot discern an abuse of discretion and this argument is overruled.

Defendant next argues that the trial court erred in admitting evidence that months before the murder defendant had access to a gun. Defendant contends that the evidence of prior access to a gun was irrelevant. We disagree.

A trial court's rulings on relevancy are not reviewed under the abuse of discretion standard; however, such rulings are given great deference upon appeal. *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citing *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). "[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984) (citation omitted).

Here, no gun was recovered which could be linked to Carlton's murder. However, an empty gun case was seized from defendant's home. Witness testimony that several months prior to Carlton's murder defendant had access to a gun, particularly when combined with that fact that defendant had an empty gun case, satisfies the threshold set forth in *Hannah* to prove that defendant had a gun in early December 2004 with which he could shoot and kill Carlton. Because the evidence was relevant, this argument is overruled.

Finally, defendant argues that the trial court erred in denying his motion to dismiss. We disagree.

Defendant contends that the State presented insufficient evidence to prove beyond a reasonable doubt that defendant murdered Carlton. However, upon a defendant's motion to dismiss charges, the standard of proof is not "beyond a reasonable doubt."

The question for the trial court in deciding a motion to dismiss criminal charges is "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) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). Substantial evidence is relevant evidence that a "'reasonable mind might accept as adequate to support a conclusion.'" *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). Such evidence may be direct, circumstantial, or both. *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Circumstantial evidence alone "'may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.'" *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). "[C]ontradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence. Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334,

343 (1998) (citations omitted). Whether the State has carried its burden of proving a defendant's guilt "beyond a reasonable doubt" is for the jury to decide.

The essential elements of first degree murder of which the State was required to present substantial evidence in order to survive a motion to dismiss are: (1) the unlawful killing, (2) of a human being, (3) with malice, and (4) with premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979) (citations omitted). Here the State presented circumstances from which the jury could find that defendant unlawfully killed Carlton with malice, premeditation, and deliberation. Therefore, this argument is overruled.

Having overruled defendant's arguments, we hold no error in the proceedings of the trial court below.

No error.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).