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NO. COA09-1396

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

Wake County
No. 08 CRS 34312

CHARLES LEON HORTON, JR.

Appeal by Defendant from judgment entered 12 February 2009 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Philip A. Telfer, for the State.

David L. Neal for Defendant.

STEPHENS, Judge.

I. Procedural History

Defendant Charles Leon Horton, Jr. was indicted for murder by a Wake County grand jury on 8 July 2008. Defendant entered a plea of not guilty. Defendant was tried before a jury during the 11 February 2009 Criminal Session of Wake County Superior Court. On 12 February 2009, the jury found Defendant guilty of voluntary manslaughter. The trial court entered judgment upon the jury's verdict, sentencing Defendant to 110 to 141 months in prison.

Defendant filed notice of appeal on 12 February 2009.

II. Factual Background

The State's evidence tended to show the following: Sarah "Mona" McDuffie, Defendant's girlfriend at the time of the events at issue, testified that on 5 June 2008, she picked Defendant up from Debra Graham's house at about 8:30 p.m. to go to a cookout at McDuffie's parents' house. Ronald Dunn, Defendant's friend, joined them. McDuffie testified that while at the cookout, the three of them consumed some alcohol and that throughout the evening, Dunn and Defendant were arguing, although the arguing was not serious.

At or around 11 p.m., on the way back to Graham's house, Defendant and Dunn were laughing and joking together. However, after consuming more drinks at Graham's house, the two men began "horse playing" so McDuffie told them to "chill out[.]" They responded that they "always do this." At that point, neither man appeared to be angry.

At a certain point, Defendant and Dunn went outside. McDuffie testified that the two men then came back inside Graham's house, consumed some alcohol, and laughed together for a few minutes before going outside again. After about five or 10 minutes, Defendant came back into the house alone. McDuffie testified that Defendant "was upset. . . . He [was] angry." Defendant had a knife in his hand and said, "I will f--- him up. I will f--- him up."

McDuffie testified that she tried to calm Defendant down and when Defendant walked outside, McDuffie followed him. Dunn came out of a nearby house and walked toward Defendant. McDuffie testified, "That's when I realized, you know, this is going to be the person [Defendant] is talking about." McDuffie turned away

from the two men to yell to James A. Petty, who was standing in the doorway of the house from which Dunn had just exited, to call the police. McDuffie testified that when she turned back toward Defendant and Dunn, they had "connected[,] " but McDuffie did not see who hit who first. From McDuffie's view, she could only see Defendant's back but could see that Dunn was bleeding. It appeared that Dunn got ready to swing at Defendant, but instead fell to the ground. At that point, Defendant walked toward his house, leaving McDuffie behind.

McDuffie went to Dunn, turned him over, and told him that it would be all right. Petty told McDuffie that he was going to call the police. McDuffie asked Graham's boyfriend, Thomas Sanders, to help McDuffie get Dunn in the car. However, Sanders and McDuffie were unable to move Dunn. McDuffie got scared and left to find Defendant.

McDuffie found Defendant on the porch at his mother's house, which is next door to where Defendant lives. McDuffie asked Defendant what happened, and Defendant responded that he "had to defend [himself]." McDuffie and Defendant then went to McDuffie's uncle's house. The police came to get McDuffie and Defendant and took them to the police station. McDuffie learned at the station that Dunn had died.

Officer Jessica McMillan of the Holly Springs Police Department responded to the scene. Officer McMillan found a knife without a handle stuck in the ground and a trail of blood leading from the knife to the victim's body.

Detective Daniel J. Gledhill of the Holly Springs Police Department also responded to the scene. He testified that a knife similar to the one found at the scene was found in the dish strainer at Graham's house, and similar knives were also found in Defendant's camper.

Dr. Thomas Clark, the Deputy Chief Medical Examiner, testified that Dunn died from a stab wound to the chest inflicted by a sharp object. Dr. Clark also testified that Dunn's blood alcohol level was .23.

Petty testified that he had known Defendant and Dunn for five or six years. On the night of the incident, Defendant and Dunn stopped by Petty's home and appeared to be getting along "perfect." Later that night, Petty fell asleep watching television, but was awakened by a noise outside. Petty looked through his peephole and saw someone run and fall. Petty called 911, thinking the person might have slipped on the gravel. Petty went outside, after Sanders knocked on his door, where he saw Dunn was lying on the ground bleeding. Seeing Dunn prompted Petty to go back to his house to call 911 a second time. After calling 911, Petty stayed on his porch.

Detective Lori Minschew of the Holly Springs Police Department testified that she took a statement from McDuffie in the early morning hours after the stabbing. McDuffie appeared "visibly upset" to Minschew, and McDuffie told Minschew that Defendant and Dunn had been arguing about a rap song while at Graham's house. The two men left Graham's house and later returned for a drink.

The two men left again. This time Defendant returned "extremely angry and started going off" for about thirty seconds. McDuffie told Minschew that Defendant held a knife in his hand and said, "I am going to f--- him up. I am going to kill him." McDuffie tried to calm Defendant down, but was unable to stop Defendant from going back outside. Once outside, Dunn came down from Petty's porch, and Dunn and Defendant began fighting. When asked what McDuffie meant by "fighting," McDuffie said she did not see anyone put hands on anyone else. McDuffie stated that she turned to ask Petty to call 911, and when she turned around, she saw Dunn fall to the ground while Defendant walked away. McDuffie tried to help Dunn. Afterward, McDuffie left the scene to look for Defendant.

Detective Steve Brewington of the Holly Springs Police Department testified that he was with Defendant at the police station in the early morning hours after the stabbing. Defendant first said that he had to protect himself because Dunn had pointed a gun at Defendant. At or around 4:30 a.m., Detective Brewington took Defendant's statement. Defendant said that Dunn had jumped Defendant to get back at Defendant for an argument between the two men. Defendant stated that Dunn hit Defendant twice with a pocket knife in his hand. Although Defendant told Dunn not to hit him again, Dunn hit Defendant a third time. Defendant then told Dunn, "[I'm] going to go to your ass." Defendant stated that he and Dunn tussled, but that Defendant did not have a knife.

Defendant stated that as he fought with Dunn, Defendant picked up "the first thing he could see" and that he "probably cut him."

Defendant further stated that Dunn was on Defendant's back, that Defendant pushed Dunn off, and then Defendant cut Dunn. Defendant stated, "[I]t won't [sic] no stab or nothing. I swung like hell." Defendant stated that he got in McDuffie's car and left the scene.

Detective Brewington told Defendant his story did not make sense. In response, Defendant said that he and Dunn were arguing when they came back in the car, that Dunn hit Defendant in the eye twice but that Defendant laughed it off, and that Defendant stopped laughing when Dunn hit him a third time. Defendant said he looked at the bench where this knife was and told Dunn, "I am going to cut your ass."

Defendant's evidence tended to show the following: George Ward, McDuffie's father, testified that on the night of the incident, Dunn and Defendant attended a cookout at Ward's home. Ward heard Dunn tell Defendant that Dunn was going to "get him" and that he was going to "f--- [Defendant] up." Defendant laughed and responded, "[I]f you are going to get me, just come on and get me." At the time, Ward did not think there was any danger. Ward did tell the two men to "hold it" when they were arguing, and Dunn "eased back down."

Defendant testified that Dunn was a friend. On 5 June 2008, the two men were drinking together. Dunn became aggressive and made continuous threats against Defendant because Dunn was still angry about being hit in the stomach by Defendant on the previous day. Several times on 5 June 2008, Dunn told Defendant he was going "to get you" or "to f--- you up." After the cookout,

Defendant, Dunn, and McDuffie returned to Graham's house. The two men went outside where Dunn again talked about "getting" Defendant. In response, Defendant told Dunn that if Dunn was going to do something, to "go ahead and get it over with." Although Defendant did not expect anything to happen, Dunn punched Defendant in the eye and the jaw.

Defendant testified that he was upset after being hit by Dunn so he picked up a knife on a bench near Petty's trailer. Defendant ran back to Graham's house where McDuffie told Defendant that his face was swollen. Defendant testified that he decided to go home and left the trailer with McDuffie. Dunn came running from Petty's porch toward Defendant. Defendant testified that he was scared. Defendant stated that Dunn started "passing licks" and, after Defendant had been knocked to the ground, Defendant swung the knife. Defendant testified that he had no choice other than to stab Dunn because Defendant feared for his own life. Although the handle of the knife broke off, Defendant had no recollection about what happened to the handle.

III. Discussion

Defendant first contends that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence that Defendant did not act in self-defense. Specifically, Defendant contends that the State was bound by Defendant's exculpatory statements regarding his use of self-defense as the statements were neither contradicted nor proven false.

A trial court properly denies a defendant's motion to dismiss if it finds that the State presented substantial evidence of: (1) each essential element of the offense with which defendant was charged and (2) defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). When ruling on a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *Id.* Any contradictions or discrepancies in the evidence are for resolution by the jury. *Id.* "If the trial court determines that a *reasonable* inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002).

In a murder prosecution, when the defendant has presented evidence that he acted in self-defense, the State must prove beyond a reasonable doubt that defendant did not do so. *State v. Potter*, 295 N.C. 126, 143, 244 S.E.2d 397, 408 (1978). Moreover, "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by

these statements." *State v. Johnson*, 261 N.C. 727, 730, 136 S.E.2d 84, 86 (1964). However, if all the evidence adduced at trial, taken together, is sufficient to throw a different light on the circumstances of the crime so as to impeach the defendant's version of the incident, the State is not bound by the defendant's exculpatory statements. *State v. Hankerson*, 288 N.C. 632, 638, 220 S.E.2d 575, 581 (1975), *reversed on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977); *see also State v. May*, 292 N.C. 644, 658, 235 S.E.2d 178, 187, *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288 (1977).

In this case, McDuffie testified that Defendant told her, "I had to defend myself" and showed her where he had been hit in the head by Dunn. Moreover, McDuffie testified that she saw Defendant getting up off the ground as Dunn was lunging toward him with the swing of a fist before Dunn collapsed. Defendant argues that "[n]o subsequent testimony or evidence contradicted this story or showed it to be false." We disagree.

McDuffie also testified that on the night of 5 June 2008, Defendant, Dunn, and McDuffie went to Graham's house where Defendant and Dunn were drinking and "just horse playing." After they had "been there for a little while[,] " laughing and joking, Defendant and Dunn "[got] up to go outside." They came back inside and had another drink. After about five minutes, they walked back outside together. McDuffie stayed inside and talked to Graham. After about five or 10 minutes, Defendant came back into the house alone. "He was upset. . . . He [was] angry." Defendant had a

knife in his hand and said, "I will f--- him up. I will f--- him up." McDuffie testified that she tried to calm Defendant down and when Defendant walked outside, McDuffie followed him. Dunn came out of a nearby house and walked toward Defendant. McDuffie testified, "That's when I realized, you know, this is going to be the person [Defendant] is talking about." McDuffie told Petty to call the police. McDuffie "didn't see who hit who first[,] but when she turned around, "I see [Dunn] -- the back of [Defendant] and [] Dunn standing and he is bleeding and he [is] getting ready to swing at [Defendant] again and he fall [sic]." She further testified that she saw Defendant stand up and tell Dunn to look at his shirt. Dunn "looked down at his shirt and he looked back up and he was getting ready to swing at [Defendant] again. He just -- he collapsed."

Detective Minschew interviewed McDuffie in the early morning hours of 6 June 2008. McDuffie told Minschew that she had gone to Graham's house with Defendant and Dunn "to hang out and have a few drinks." McDuffie said that Defendant and Dunn went outside together twice. The second time, Defendant came back inside by himself and was "extremely angry and started going off for probably 30 seconds." McDuffie said that Defendant had a knife in his hand and said, "[Dunn] hit me, I am going to f--- him up. I am going to kill him."

Detective Brewington testified that in the early morning hours of 6 June 2008, he interviewed Defendant. During the interview, Defendant said that Dunn hit him in the eye twice and then "we got

to tussling. The next thing you know everything just happened." Defendant stated that Dunn told Defendant that he had cut him, but Defendant told Dunn, "I ain't got no knife[.]" Defendant went to his mother's house and told her that "they say I cut this boy but I don't remember cutting him. Call the police."

Detective Brewington asked Defendant where the knife had come from and Defendant told him that he had "grabbed the first thing he could see" and that it came from "the bench outside of [Petty's] house." During the interview, Defendant did not mention the first altercation he had with Dunn, nor did he mention returning to Graham's house between altercations with a knife in his hand and threatening to kill Dunn.

We conclude that "[w]hile none of these circumstances taken individually flatly contradicts [D]efendant's statement, taken together they are sufficient to 'throw a different light on the circumstances of the [crime]' and to impeach . . . [D]efendant's version of the incident. The State is not bound, therefore, by the exculpatory portions of [D]efendant's statement." *May*, 292 N.C. at 660, 235 S.E.2d at 188 (quoting *Hankerson*, 288 N.C. at 638, 220 S.E.2d at 581). Accordingly, the case was for the jury and the trial court did not err in denying Defendant's motion to dismiss.

Defendant next argues that the trial court violated his constitutional rights to due process and to present the defense of self-defense by sustaining the State's objection to Defendant's question regarding the victim's character for violence.

At trial, the following exchange took place during defense counsel's direct examination of Defendant:

[DEFENSE COUNSEL]: Did you know his reputation for violence?

[DEFENDANT]: Yes.

[THE STATE]: Objection.

[THE COURT]: Sustained.

[DEFENSE COUNSEL]: Now, given that, what did you do next?

Although Defendant now argues that the trial court's ruling violated his constitutional rights, Defendant failed to object at trial to the trial court's ruling on constitutional or any other grounds. "[C]onstitutional error will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). Moreover, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make" N.C. R. App. P. 10(b)(1). As Defendant failed to object to the trial court's ruling at trial, Defendant has failed to preserve it for appellate review and, thus, has waived appellate review of the issue. *Chapman*, 359 N.C. at 366, 611 S.E.2d at 822. Accordingly, this assignment of error is dismissed.

For the reasons stated herein, Defendant received a fair trial, free of error.

NO ERROR.

Judges HUNTER and GEER concur.

Report per Rule 30(e).