NO. COA09-1668

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. McDowell County
No. 08 CRS 50066

DANIEL WAYNE SCOTT,
Defendant.

Appeal by defendant from judgment entered 6 August 2009 by Judge Laura J. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 24 May 2010.

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

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in a bill of indictment by the McDowell County Grand Jury with the first-degree murder of William Christopher Smith. He entered a plea of not guilty and gave notice that he may assert the affirmative defense of voluntary intoxication, accident, or self-defense. Venue was transferred to Rutherford County. A jury convicted defendant of voluntary manslaughter. He appeals from the judgment entered on the verdict.

The State's evidence tended to show that defendant is paraplegic and confined to a wheelchair as a result of an

automobile accident in 2000. He lived with his mother, Lillian Scott. He used a motorized wheelchair and would sometimes ride it to a small pull-off camping area less than a mile from his home. William Christopher Smith, who lived near defendant, was his very good friend; the two of them drank alcohol together, sometimes excessively.

On 8 January 2008, Mrs. Scott returned home from work around 7:30 p.m. Defendant and Smith were in defendant's room and she could tell they had been drinking. Later that evening, defendant and Smith left the home; Smith was riding a moped and defendant was riding his motorized wheelchair. Later still, Mrs. Scott heard two gunshots and then a single gunshot. A few minutes later, between 11:30 p.m. and midnight, defendant returned home "terrified" and drunk; he told Mrs. Scott "that he thought he had shot [Smith]." Mrs. Scott told defendant that she would call 9-1-1, but she did not because she did not believe him, testifying that "he tells [her] all kind of tales when he is drinking." Defendant asked her to help him change his clothes, which she did. Around midnight, defendant called his sister, Terri Burns, asking to speak to her husband, Robert Burns. He told Terri "he thought he had shot someone" and told Robert that he had gotten into some trouble, needed help, and wanted Robert to pick him up and take him somewhere. When defendant called a second time, Terri asked her husband to go over and determine whether anyone had been shot. Robert did not notice anything unusual at defendant's house, but when backing up the drive, he noticed a motorcycle sitting in the

pull-off camping area and saw a body laying there. When the person did not respond to his shouts, he called Terri and she told him to call 9-1-1.

Shortly after midnight, defendant called another sister, Toni Allen, and told her "that he was in trouble and he needed [her] to come get him." He told her he had killed someone, that he "shot him," asked her to come get him and take him somewhere to hide, and that the shooting had occurred "up the hill." She talked to her mother who did not know if defendant had actually killed someone, but in the background she heard defendant saying "I did—I did it."

Dudley Greene, then Captain of Detectives at the McDowell County Sheriff's Office and, at the time of trial, the McDowell County Sheriff, was called to the scene. There was a campfire burning and liquor and beer bottles were scattered around. Sheriff Greene did not notice any obvious injury to Smith's body until the medical examiner arrived and turned the body over. Then, he noticed blood around Smith's mouth. It was later determined that Smith had sustained a gunshot wound to the interior of his mouth.

Detective Lieutenant Dan Shook, then a senior detective for the Sheriff's Office, was also called to the scene. Detective Shook sought to make contact with defendant through Robert Burns, but Burns was unable to get an answer to his telephone attempt. Either Mr. Burns or his wife was able to contact Mrs. Scott and instructed her to leave the house and walk to a waiting patrol car. She reported to Detective Shook that defendant had a gun, had reloaded the gun, and had told her that he had "shot his buddy."

The officers obtained a warrant for defendant's arrest and he was taken into custody. After defendant was placed in custody, he told Detective Shook, "Dan, I didn't shoot him. The boy shot himself." Defendant consented to a search and told the detectives where the gun was located. Detective Shook retrieved the gun and a box of bullets from defendant's room, along with a live 32-caliber bullet found in the hallway. During rebuttal testimony, Detective Shook testified defendant appeared "unusually sober and there was no odor of alcohol" at the time he was arrested the morning after Smith was killed.

Defendant was taken to the Sheriff's Office where he was read and waived his *Miranda* rights. Defendant told Detective Shook that Smith had shot himself. Defendant said that he and Smith had been drinking alcohol and popping pills and Smith told defendant "that he had some pending check cases in court and that he might as well just shoot himself." Detective Shook knew that Smith's father had told Sheriff Greene that he had taken Smith to court the day he was shot. Defendant said that he tried to discourage Smith, but when Smith asked for the gun, defendant gave it to him and Smith shot himself in the head. Defendant demonstrated by pointing his finger to his right temple. Smith was left-handed.

An SBI agent collecting evidence at defendant's home found a jacket which appeared to have several very small blood droplets on the sleeves and cuff, which Detective Shook testified were consistent with blowback from a fired weapon. DNA testing revealed that the blood spots on one sleeve of the jacket belonged to Smith;

the other bloodstain belonged to defendant. Mrs. Scott testified that defendant had been wearing the jacket the night of the shooting. A vest located in defendant's room had four live 32-caliber bullets in the pocket. A live 32-caliber bullet was also found next to Smith's body. Detective Shook testified that Smith's pants had stains on the knees and it "appears that the victim had been on his knees at some point." Detective Shook also testified that defendant had a bag packed as though he were leaving. A gunshot residue test on Smith's hands was positive.

After applying for a second search warrant, Detective Shook recovered two spent shell casings which Mrs. Scott had thrown into a trash can in defendant's room after he had reloaded the gun. Mrs. Scott also turned over to Detective Shook two misfired bullets which she had found under defendant's wheelchair.

Dr. Eugene Patrick Lantz, a professor of pathology at Wake Forest University Baptist Medical Center and regional forensic pathologist for the State, conducted an autopsy on Smith's body. He noted gunpowder residue on Smith's lips, as well as stippling where unburned powder had touched his lips. This finding indicated to Dr. Lantz that the gun had been fired at close range and the muzzle was almost touching Smith's lips. Dr. Lantz testified, "The end of the gun was not in the mouth, on the other side of the teeth, but just on this side of the lips, just almost touching the lips, but not quite." The bullet went through Smith's tongue, through the back of the mouth, and into the brain. The bullet's trajectory was "going from the front of the body or from the front

of the head backwards, it was going upwards and then just slightly to the left." Dr. Lantz opined that the position of the gun when it was fired was "very uncommon" for a suicide. He also testified that if a victim was left-handed, like Smith, he would have had to "bring the gun across the midline" and point it back to the left to shoot himself with his left hand. The bullet recovered from Smith's brain during the autopsy was determined to have been fired from the same gun as that taken from defendant's room. Smith's blood alcohol level was measured at 0.28.

After defendant had been placed under arrest, defendant's mother told Detective Shook that defendant and Smith had been "fussing" and that defendant had told Smith to "shut up and leave him alone," but Smith continued to aggravate defendant. She stated that "in the past she has overheard [defendant] tell [Smith] that if he had a gun, he would shoot him, and she guessed that he finally did."

Defendant testified in his own behalf. He testified that he and Smith drank and did drugs shortly before Smith's death, and that he and Smith were playing with the gun and he was "pretty sure" they had been firing the gun that night. He testified that the gun was worn and missing parts and that it would misfire. He testified that he did not know exactly what had happened that night because he was so intoxicated. Defendant confirmed that he had told Detective Shook, "I didn't shoot [Smith], that boy shot himself," but stated that he "can't say that [Smith] shot hisself [sic]" or whether he shot Smith. He said that Smith was worried

and upset about having to go to court and did not want to go back to prison. He testified that he asked his relatives to come and get him because he was scared. Mrs. Scott testified that Smith and defendant both used alcohol to excess.

On appeal, defendant argues that his trial counsel provided ineffective assistance of counsel in various respects. The North Carolina Supreme Court in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), expressly adopted the test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248. The *Strickland* test has two prongs. First, "the defendant must show that counsel's performance was deficient," and second, "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. A counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." *Id.* at 688, 80 L. Ed. 2d at 693.

After a defendant has identified "the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment[,] [t]he court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690, 80 L. Ed. 2d at 695. Even if the acts or omissions are found to be outside the range of competent

assistance, a judgment will not be overturned absent a showing that the error had an effect on the judgment. *Id.* at 691, 80 L. Ed. 2d at 696. *Strickland* also instructs us that we may dispose of a claim of ineffective assistance of counsel by examining the prejudice ground even before determining if counsel's performance was, in fact, deficient. *Id.* at 697, 80 L. Ed. 2d at 699.

This Court has stated, "[i]n general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). As the United State Supreme Court explained in *Massaro v. United States*, 538 U.S. 500, 155 L. Ed. 2d 714 (2003),

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. . . . The evidence introduced at trial . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

538 U.S. at 504-05, 155 L. Ed. 2d at 720-21. However, ineffective assistance of counsel "claims brought on direct review will be

decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862, *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). The record in this case is sufficient to enable us to decide defendant's ineffective assistance of counsel claims on the merits.

Defendant first alleges that trial counsel rendered ineffective assistance of counsel by failing to move to dismiss at the end of all the evidence. While trial counsel did make a motion to dismiss at the end of the State's evidence and at the end of defendant's evidence, he failed to move for a dismissal after the State's rebuttal evidence. Defendant argues that had trial counsel moved to dismiss at the end of all the evidence, "the result of his trial would have been different." We disagree. The trial court denied defendant's motion to dismiss at the end of the State's evidence and at the end of defendant's evidence. The evidence presented on rebuttal tended to show that defendant was sober when he was arrested rather than so intoxicated he was unaware of what he was doing and that he may have lied about smoking crack cocaine. We believe there is no reasonable possibility that the trial court would have granted defendant's motion to dismiss after receiving this additional evidence, which was not helpful to defendant, when it had twice denied the motion at the close of the State's and

defendant's evidence. Thus, we conclude that defendant was not prejudiced by his trial counsel's failure to move, a third time, for dismissal of the charges at the close of all of the evidence.

Defendant also argues that trial counsel's failure to move for a dismissal of the charges a third time, at the close of all the evidence, was ineffective assistance of counsel because his failure to do so precludes defendant from challenging the sufficiency of the evidence on appeal unless this Court elects to review the issue pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 2. Even if defendant's trial counsel had properly preserved this issue, we conclude the evidence was sufficient to withstand defendant's motion to dismiss, and therefore, there was no prejudice to defendant.

> When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Williams, 363 N.C. 689, 705-06, 686 S.E.2d 493, 504 (2009) (internal quotation marks and citations omitted). We hold that there was substantial evidence of each element of the charge of voluntary manslaughter and substantial evidence that defendant was the perpetrator.

"Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation

and deliberation." *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981). "Generally, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor." *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001). "To survive a motion to dismiss a charge of voluntary manslaughter, the State must bring forth a quantum of evidence, viewed in their favor, that allows a reasonable inference that [Smith] was intentionally killed and that defendant was the perpetrator of the killing." *See State v. Lassiter*, 160 N.C. App. 443, 454, 586 S.E.2d 488, 497, *disc. review denied*, 357 N.C. 660, 590 S.E.2d 853 (2003).

The State presented substantial evidence that Smith was intentionally killed by defendant. The State presented evidence that defendant told several members of his immediate family that he had shot or killed someone and wanted them to take him somewhere. The forensic evidence showed that the bullet which caused Smith's death was fired by defendant's gun. Smith's blood was found on the jacket worn by defendant on the night of the shooting. Although defendant told law enforcement that Smith had shot himself, the position of the gun was "very uncommon" for suicides and the forensic pathologist testified that Smith would have had to hold the gun in a strange way to make the trajectory of the bullet appear as it did. Defendant's mother testified that the two men had been fighting and that Smith did not leave defendant alone.

She also testified that she had previously heard defendant threaten to shoot Smith if he had a gun.

Nevertheless, defendant argues that the evidence was insufficient because it makes it no more likely that defendant shot Smith than that Smith shot himself. However, on appellate review, we must view the evidence in the light most favorable to the State and resolve all inconsistencies in its favor. *State v. Spellman*, 40 N.C. App. 591, 592, 253 S.E.2d 320, 322, *disc. review denied*, 297 N.C. 616, 267 S.E.2d 657, *cert. denied*, 444 U.S. 935, 62 L. Ed. 2d 193 (1979). In this light, we conclude the State presented substantial evidence to show that defendant intentionally killed Smith.

For his next assignment of error defendant ostensibly argues that his trial counsel provided ineffective assistance of counsel because counsel requested an instruction on voluntary manslaughter and failed to move to vacate the verdict of voluntary manslaughter. However, the error that defendant alleges is that the instruction and verdict were for an offense not supported by the evidence. Thus, defendant has attempted to re-characterize as a new argument a continuation of his argument that the evidence was insufficient to support a charge of voluntary manslaughter. As we have already determined that the evidence was sufficient to support the charge, we cannot conclude that trial counsel's performance in this regard was deficient.

We also reject defendant's final argument that the trial court erred in failing to intercede and vacate the verdict finding

defendant guilty of voluntary manslaughter *sua sponte*, due to the insufficiency of the evidence. As we have previously determined that the evidence was sufficient to withstand defendant's motion to dismiss, we conclude it was not error for the trial court to fail to vacate the verdict *sua sponte*.

No error.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).