NO. COA09-185

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v. Gaston County
No. 06 CRS 057448

JESSICA HILL TYSON

Appeal by defendant from judgment entered 16 October 2008 by Judge Calvin E. Murphy in Superior Court, Gaston County. Heard in the Court of Appeals 1 September 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Mark A. Davis, for the State.

Reita P. Pendry, for defendant-appellant.

WYNN, Judge.

Defendant Jessica Hill Tyson appeals from a jury verdict finding her guilty of first-degree murder and a judgment, entered 16 October 2008, sentencing her to life imprisonment without parole. After careful review, we find no error.

At trial, the evidence tended to show the following: On 11 May 2006 at approximately 10:30 p.m., fifteen-year-old Adrian Perkins and seventeen-year-old Chester Parker walked down a narrow pathway alongside a set of railroad tracks, leading toward their homes. As they walked, they heard a woman's voice say, "It better not be Killer. It better not be Killer." Parker and Perkins then

saw Defendant and a tall, heavyset man coming toward them; the man was later identified as Michael Oliver. Perkins responded, "We ain't no Killer. This ain't no Killer. You got the wrong person." Defendant replied, "I couldn't help it, y'all all look the same to me[.]"

Defendant then confronted Parker, claiming "he had flexed her over . . . some fake dope." Parker and Perkins denied the accusations but Defendant "kept saying, [']yeah, you did, yeah, you did, yeah, you did.[']" Parker asked Defendant if she was a police officer; Defendant replied, "I could prove to you that I'm not the police" and stabbed Parker with a knife. Parker fell to the ground, and Oliver began punching him. Perkins started "fighting" Oliver, and "punched him a couple times." Shortly thereafter, Defendant and Oliver ran off toward Weldon Street.

Parker attempted to stand up a number of times but repeatedly fell down. Perkins called for help. Michael Pegram and a woman named Joyce came to Parker's aid. When Gaston County Emergency Medical Services arrived at the scene, Parker was unconscious, and had no pulse or vital signs. On 12 May 2006, Dr. Peter Wittenburg conducted the autopsy on Parker and determined that he died from a hemorrhage secondary to a stab wound to his chest.

Pegram testified that he was sitting on the front porch of his aunt's house on the evening of 11 May 2006, and heard Defendant declare that "she was going to kill somebody tonight" as she and Oliver walked off down the path near the railroad tracks. Sometime later, he saw "two young little guys" head down the same road. He

heard "the bushes rumbling, you know, like it was . . . somebody wrestling . . . ." Then he saw Oliver and Defendant exiting the path, Defendant with a knife in her hand.

Anthony Eaves, who was on the porch with Pegram that night, "heard somebody say [']you've got the wrong one[.']" He testified that he saw one of the young men fall, get up, and fall again; "That's when [Defendant] come out of the path with a knife." He heard Defendant say, "'I just stabbed me a mother f**ker. If you don't believe me, look at the knife. Look at the blood on the knife.'" Eaves ran after Defendant and Oliver, and eventually saw them enter the Budget Inn.

Officer Alvaro Jaimes testified that he was called to the Budget Inn, where he noticed a taxi cab which appeared to be waiting to pick up a customer. The driver told Jaimes he was waiting for a man and a woman. As Defendant and Oliver approached, Jaimes testified that the taxi driver said, "'[O]h wait, this is them right here.'" The officer noticed that the man and woman walking toward the cab matched Oliver and Defendant's description.

Officer Jaimes recalled that, as they were being detained, Defendant yelled, "'Look at my throat, look at my throat. They tried to jump on him.'" He also testified that Oliver complained of pain on his side near his ribs. However, the Emergency Medical Technician that examined Oliver found no evidence of any injury, and Officer Jeremy Williams testified that he saw no signs of injury on Defendant or Oliver.

Officer Williams testified that he brought Perkins to the

motel where he identified Defendant as the woman who stabbed Parker. Williams testified that he observed Defendant "very angry kicking around in the back in the car and hollering" and heard her say, "'I stuck the n**ger.'" Officer Willis testified that Defendant said she dropped the knife in the driveway of a home, on the corner of Weldon and Main Street. Officer Clark testified that he found the knife in the front yard of a residence on Main.

Officer Jimmy West testified that, when he told Defendant that she was under arrest for murder, some hours later, Defendant "made a little - a little - like a little snicker, like a little laugh, and said, "'So the little n**ger is dead.'"

A grand jury indicted Defendant on charges of first-degree murder on 15 May 2006. The case was heard before a jury on 13 October 2008 in Superior Court, Gaston County. The jury returned a verdict of guilty of first-degree murder. The trial court entered a judgment and commitment on 16 October 2008, and sentenced Defendant to a term of life imprisonment without parole.

Defendant appeals from her conviction for first-degree murder, arguing the trial court erred by: (I) failing to give a jury instruction on self-defense; (II) denying Defendant's motion to dismiss the charge of first-degree murder due to insufficient evidence of premeditation and deliberation; (III) instructing the jury on flight; and (IV) instructing the jury on defense of a third person. After careful review, we find no error.

I.

First, Defendant argues the trial court erred by failing to

instruct the jury on self-defense. We disagree.

A defendant is entitled to a jury instruction on self-defense if there is evidence that the defendant formed a reasonable belief that it was necessary to kill her adversary in order to protect herself from death or great bodily harm. *See, e.g., State v. Moore*, __ N.C. App. __, 671 S.E.2d 545 (affirming the trial court's denial of instruction on self-defense where there was no evidence supporting defendant's belief as reasonable), *disc. review denied*, 363 N.C. 379, 679 S.E.2d 840 (2009). "If, however, there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill [her] adversary to protect [herself] from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense." *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982) (citation omitted).

Here, Defendant testified she recently had been attacked at the location where the stabbing occurred and, when Parker and Perkins allegedly attacked Oliver, she feared they would attack her as well. However, this evidence does not support a finding that Defendant reasonably believed it was necessary to stab and kill Parker to protect herself from death or great bodily harm. Although Defendant claims that one or both of the young men assaulted Oliver prior to the stabbing, there is no evidence to suggest that anyone hit or threatened her. Further, while Defendant may have believed that Parker and Perkins had some connection to her prior attack, there is no evidence in the record

to support this claim, other than Defendant's own conjecture. *See State v. Revels*, __ N.C. App. __, ___, 673 S.E.2d 677, 682-83 (finding no error where the evidence supporting self-defense instruction failed to "rise[] above mere possibility and conjecture"), *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204, (2009).

Because there is no evidence in the record to support a finding that Defendant *reasonably* believed that it was necessary to kill Parker in order to protect herself from death or great bodily harm, we find no error in the trial court's decision to deny Defendant's request for a jury instruction on self-defense.

II.

Defendant also argues that the trial court erred in denying her motion to dismiss the charge of first-degree murder because the State presented insufficient evidence that she acted with premeditation and deliberation. We disagree.

To survive a motion to dismiss, the trial court must determine that there is substantial evidence tending to prove each element of the crime, and that Defendant was the perpetrator. *State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 271 (1994). Discrepancies and contradictions among evidence are for the jury to resolve and do not require dismissal. *Id.* at 429, 440 S.E.2d at 271-72. On review, this Court must determine whether the evidence, taken in the light most favorable to the State, "would permit a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt." *State v. Mueller*, 184

N.C. App. 553, 560, 647 S.E.2d 440, 446, *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

First-degree murder is the intentional and unlawful killing of another human being with malice and with premeditation and deliberation. N.C. Gen. Stat. § 14-17; *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998).

> "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Bonney, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (internal citations omitted). Further, "[t]he phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." *State v. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1985) (citation omitted), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Defendant attempts to analogize the facts of her case to *State v. Williams*, 144 N.C. App. 526, 548 S.E.2d 802 (2001), *aff'd*, 355 N.C. 272, 559 S.E.2d 787 (2002). However, *Williams* is readily distinguishable. In *Williams*, the victim and the defendant were involved in an altercation outside of a nightclub. *Id.* In an attempt to prevent the victim from breaking up a fight, the

defendant pushed the victim out of the way. *Id.* at 527, 548 S.E.2d at 803. The victim punched the defendant in the jaw, and the defendant pulled out a gun and shot the victim in the neck. *Id.* at 527, 548 S.E.2d at 804. This Court reversed the defendant's conviction of first-degree murder, stating there was no evidence that the defendant and victim knew each other prior to their altercation; no evidence of animosity between them, or that the defendant had threatened the victim; the defendant was provoked by the victim's assault; the defendant immediately retaliated by firing a single shot; the altercation stopped immediately after the victim fell, and the defendant's actions before and after the shooting did not show planning or forethought. *Id.* at 531, 548 S.E.2d at 805.

Unlike *Williams*, there is no evidence here to suggest that Defendant stabbed Parker in response to any provocation by Parker or Perkins, or "under the influence of a violent passion." *Id.* Conversely, the evidence suggests Defendant was planning to kill someone the night of the murder; she thought Parker was someone she knew, a man named "Killer" whom she believed had "flexed" her over drugs; she instigated the confrontation with Parker and Perkins; she escalated the confrontation; and she eventually stabbed Parker, resulting in his death.

Unlike *Williams*, where the defendant immediately responded to the victim's assault by shooting the victim, Defendant talked with Parker and Perkins for some time before stabbing Parker without provocation. The evidence presented at trial taken in the light

most favorable to the State tended to show that Defendant said she was going to kill someone prior to the stabbing; carried a knife with her on the evening of the murder; instigated a confrontation by approaching Parker and Perkins and saying he "better not be Killer"; accused the young men of "flex[ing] her over . . . some fake dope" and "kept saying [']yeah, you did, yeah, you did, yeah, you did[']" despite their denials; and stabbed Parker in the chest without provocation.

Further, Defendant ran from the scene after the stabbing, disposed of the knife, repeatedly referred to Parker using a highly offensive racial slur, and snickered when Officer West told her Parker was dead.

In sum, we find this argument to be without merit.

III.

Defendant further argues the trial court erred by instructing the jury on flight, arguing that Defendant ultimately turned herself over to the police officers at the motel. Again, we find this argument to be without merit.

"So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977).

Here, the evidence overwhelmingly shows that Defendant "left the scene of the crime and took steps to avoid apprehension."

State v. Grooms, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000) (finding no error in the trial court's instruction on flight where the evidence "permit[ted] an inference that defendant had a consciousness of guilt and took steps, albeit unsuccessful, to avoid apprehension"), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). Indeed, the evidence, including Defendant's own testimony, shows that Defendant fled the scene, disposed of the knife she used to stab Parker, changed clothes, and called a taxi cab to pick her up from the hotel. Moreover, Defendant testified that Oliver told her to go back to the motel in order to "get away from the situation."

Accordingly, we find this argument to be without merit.

IV.

Finally, Defendant argues that the trial court's instruction to the jury on defense of a third person constituted plain error. Pursuant to Rule 10(b)(2) of the N.C. Rules of Appellate Procedure, a defendant must object to the trial court's instructions at trial in order to preserve the issue for appellate review. N.C. R. App. P. Rule 10(b)(2) (2007). As both parties agree and the record confirms, Defendant made no objection at trial to the instructions at issue on appeal. Thus, we review Defendant's objection to the instruction on defense of a third person for plain error. N.C. R. App. P. Rule 10(b)(2). After careful review of the record, we find this argument to be without merit.

"In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i)

absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997) (citation omitted), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

Here, Defendant argues that the trial court erred by giving the following instruction:

> Furthermore, defense of a third person is justified only if the defendant herself was not the aggressor. She was the aggressor if she voluntarily entered into the fight for any purpose other than the lawful one of defending a third person. *If one uses abusive language toward her opponent which, considering all of the circumstances, is calculated and intended to bring on the fight, she enters a fight voluntarily.*

(emphasis added). Defendant argues that this instruction was in error because there is no evidence in the record that Defendant used any abusive language calculated and intended to bring on a fight, and "[t]he instruction was highly prejudicial, because it allowed the jury to transform a repugnant racial slur into aggressive conduct that could defeat a claim of defense of a third person."

However, the record indicates that Defendant was verbally combative with Perkins and Parker. Perkins testified that he was initially approached by Defendant, saying, "It better not be Killer"; accused the young men of "flex[ing] her over . . . some fake dope"; and repeatedly stated "yeah, you did, yeah, you did, yeah, you did." The record further shows that shortly before Defendant stabbed Parker, she declared, "I couldn't help it, y'all

all look the same to me[.]" Because the record contains substantial evidence that Defendant used confrontational language, we find no error in the jury's instruction on defense of a third person.

In summary, the trial court properly declined to instruct the jury on the issue of self-defense; denied Defendant's motion to dismiss; and instructed the jury on the issues of flight and defense of a third person.

No error.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).