NO. COA11-1201
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

STATE OF NORTH CAROLINA

v. Lincoln County
No. 06 CRS 53287

MICHAEL RAY SEGAL

Appeal by defendant from judgment entered 20 August 2010 by Judge Forrest D. Bridges in Lincoln County Superior Court. Heard in the Court of Appeals 7 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman, for the State.

William D. Auman for defendant-appellant.

BRYANT, Judge.

Defendant Michael Ray Segal appeals from a judgment entered upon a jury verdict finding him guilty of second-degree murder. We find no error in his trial.

On 30 September 2006, defendant received a call from his brother, David Segal. David had been gambling at Creekside Fishing Lake in Lincoln County and called to ask that defendant bring him more money. Crystal Weidra, Brian Poarch, Stephanie

Segal, Philip Tumolo, and defendant assembled at defendant's apartment where defendant put on a "tactical vest" that had a built-in holster. Defendant placed a gun in the vest, and the group drove to the gambling room at Creekside Fishing Lake.

David had been playing a poker machine for about twenty-four hours. He and defendant left the machine and asked Mr. Poarch to hold the machine for them while they were gone. When defendant and David returned, they saw Mr. Poarch arguing with Allen Sisk, who had recently arrived with his son, Joshua. Mr. Sisk argued that nobody could hold the poker machine, but defendant disagreed. The two exchanged insults, and after defendant made a derogatory remark about Joshua, Mr. Sisk pushed defendant. At that point Manual Fredell, the owner of the game room, attempted to calm everyone down, but more pushing ensued.

The altercation escalated when Mr. Sisk pulled out a knife, and David used a bar stool to keep him away. Defendant then pulled a gun out, and Mr. Sisk began to approach him. Defendant asked that Mr. Sisk stay back, but when Mr. Sisk kept advancing, defendant shot him. Mr. Fredell testified that he heard several more gunshots fired.

Defendant testified that the gun was a semi-automatic, which meant he had to pull the trigger every time he fired it.

Doctor Patrick Lantz was admitted as an expert in the field of forensic pathology and testified at trial that Mr. Sisk died of injuries related to six gunshot wounds, some of which would have been lethal on their own.

Joshua, who was nine years old at the time, witnessed some of the events leading up to the shooting but not the shooting itself. In the last two lines of his written statement to the police, Joshua stated, "I think the boy shot Dad because he thought he had too [sic]." The trial court refused defendant's request to admit this portion of the statement, reasoning that Joshua was not competent to testify to what defendant might have been thinking.

At trial, defendant also attempted to introduce evidence of a domestic violence complaint and order issued against Mr. Sisk. The trial court denied defendant's request and refused to admit the evidence under N.C.R. Evid. 403.

On appeal, defendant raises the following three issues: did the trial court err by (I) denying defendant's motion in limine to admit Joshua's full statement; (II) excluding the admission of a domestic violence protective order issued against

the victim; and (III) denying the motion to dismiss the charge of second-degree murder.

I

Defendant first argues that the trial court erred by denying defendant's motion in limine to admit Joshua's full statement. Specifically, defendant contends that Joshua's lay opinion statement that "I think the boy shot Dad because he thought he had to[]" amounted to an instantaneous conclusion based on his perception which was admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 701 and was substantial evidence in support of defendant's theory of self-defense. We disagree.

If a lay witness provides opinion testimony, it must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.R. Evid. 701 (2012). Our Supreme Court has interpreted Rule 701 to allow testimony in the form of a "shorthand statement of fact." *State v. Roache*, 358 N.C. 243, 287-88, 595 S.E.2d 381, 410 (2004) (citation omitted). A shorthand statement of fact includes "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the

senses at one and the same time." *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *vacated in part by* 428 U.S. 904, 49 L. Ed. 2d 1210 (1976); *see also State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000) (holding there was no error in admitting testimony that the victim's screaming sounded "like somebody fearing for his life" and that the crime scene was worse than a "hog killing" as instantaneous conclusions based upon the witness's observation.).

Here, two days after the victim was killed, a detective with the Lincoln County Sheriff's Department took Joshua's statement. In the last sentence, Joshua stated "I think the boy shot Dad because he thought he had to[]."

In a pre-trial motion in limine, defendant sought to admit Joshua's statement as substantive evidence under North Carolina Rule of Evidence 803(24), claiming that the statement was probative of defendant's self-defense claim. Defendant argued that the statement was admissible as one of several exceptions to the hearsay rule.

Reviewing the matter during trial, outside of the presence of the jury, the trial court ruled "that if [defendant] wish[es] to offer the statement rather than the live testimony of Joshua Sisk, you may do so with the exception of the last two lines in

that statement [– '*I think the boy shot because he thought he had too*.'] If you choose not to do that, you may offer the child as a witness to testify." The trial court gave the following basis for its ruling:

> [F]irst of all, without making determinations as to the admissibility or inadmissibility under the hearsay rule and exceptions thereto . . . the problem I have with the statement . . . is the very last two lines of the statement, which reads specifically, "I think the boy shot dad because he thought he had to." . . . [I]n that statement the witness is saying I think he thought, and that is absolutely incompetent testimony. . . .
>
> Secondly, to the extent that that portion of the statement might be argued to be a shorthand statement of the facts, it involves a conclusion that the child is not competent to make. . . . [H]e didn't see the shooting. He was not present at the moment that the shooting took place, according to his own statement.

Defendant submitted Joshua's redacted statement to the jury over his own objection.

Defendant contends that Joshua's lay opinion statement was admissible pursuant to Rule 701. We disagree. Joshua's statement makes clear that he did not witness the shooting or the moments just before: "I saw my dad pull out his razor knife. I ran out of the building and ran on the hill beside the game room. . . . I came back into the building and my dad was

dead." Thus, his opinion that "the boy shot because he thought he had to[]" was not rationally based on Joshua's perception, as required by Rule 701, and therefore could not have been a "shorthand statement of fact." *See Spaulding*, 288 N.C. at 411, 219 S.E.2d at 187. Moreover, such speculation would not have been helpful to the jury's determination of whether defendant acted in self-defense. *See* N.C.R. Evid. 701. Accordingly, defendant's argument is overruled.

II

Defendant next contends the trial court erred by failing to allow the admission of a domestic violence protection order issued against the victim. Defendant insists that the domestic violence protection order was evidence related to the victim's reputation as being violent and aggressive; related to the victim's intent, motive or plan; and was admissible to corroborate defendant's trial testimony. Since his "entire [defense] relied on his assertion of self-defense," defendant claims that the trial court's failure to allow admission of the domestic violence protection order violated defendant's due process right to a fair trial. We disagree.

Under North Carolina Rule of Evidence 404(a), evidence of character is generally inadmissible, but where an accused offers

evidence of a pertinent character trait of the victim, it is admissible. N.C.R. Evid. 404(a)(2) (2011). Furthermore, if a character trait is an essential element of a charge, defense, or claim, proof of that character trait may be made by evidence of specific instances of the victim's conduct. N.C.R. Evid. 405(b) (2011).

When a defendant claims he acted in self-defense, evidence of "the victim's character may be admissible for two reasons: to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor." *See State v. Watson*, 338 N.C. 168, 187, 449 S.E.2d 694, 706 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569, *rev'd on other grounds*, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). If introduced to show a defendant's fear of the victim was reasonable, evidence of a victim's character is relevant only "if defendant had knowledge of the victim's character at the time of the encounter." *State v. Ray*, 125 N.C. App. 721, 725, 482 S.E.2d 755, 758 (1997).

Here defendant acknowledged he did not know of the allegations in the domestic violence protective order or of the victim's reputation for violence at the time he shot the victim. Nevertheless, defendant argues that the specific acts addressed

in the domestic violence protective order were admissible as evidence demonstrating "the victim could be a violent man" and, thus, was the aggressor. However "the commentary to Rule 404(b) infers that . . . evidence of a violent disposition to prove that a person was the aggressor in an affray is an impermissible use of evidence of other crimes and, therefore, not admissible under 404(b)." *State v. Smith*, 337 N.C. 658, 665, 447 S.E.2d 376, 380 (1994). The official commentary to Rule 404 explains that "evidence of a violent disposition to prove that the person was the aggressor in an affray" is a "circumstantial" use of evidence. N.C.R. Evid. 404 commentary. "When character is used circumstantially . . . proof may be only by reputation and opinion." N.C.R. Evid. 405 commentary.

At trial, defendant sought to admit character evidence to be used circumstantially to prove that the victim was the aggressor. *See* N.C.R. Evid. 404 commentary. Because the domestic violence protective order is neither reputation nor opinion, the trial court properly refused to admit it into evidence. *See* N.C.R. Evid. 405 commentary.

Defendant also attempts to assign error to the trial court's refusal to admit the domestic violence protective order under Rule 404(b). However, under Rule 404(b), defendant would

have to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident" in order for evidence of other acts to be admissible. N.C.R. Evid. 404(b). Defendant merely asserts that "the excluded evidence should have been admissible as it related to the intent, motive, or plan of Mr. Sisk." Beyond those bare assertions, neither the defendant's argument nor the record reveal any intent, motive, or plan associated with Mr. Sisk's actions. Thus, defendant failed to establish a basis for admitting evidence of other acts under N.C.R. Evid. 404(b). Therefore, this argument is overruled.

Finally, on appeal defendant argues for the first time that the trial court should have admitted the domestic violence protective order to corroborate defendant's trial testimony. However, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1). Even though at trial defendant did not state or even reference these specific grounds that he now argues on appeal, they may still be the

basis for an issue on appeal if "the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Because defendant failed to argue plain error, however, this assignment of error has been waived and is dismissed.

For these reasons, the trial court did not err by refusing to admit evidence of the domestic violence protective order.

III

Finally, defendant contends that the trial court erred in denying defendant's motion to dismiss because the evidence was insufficient to prove that defendant committed second-degree murder. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C.

373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). A trial court must review denial of a defendant's motion to dismiss "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983) (citations omitted). In North Carolina, there are at least three types of malice, one of which "is defined as nothing more than that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citations and internal quotation marks omitted).

In the instant case, the State offered sufficient evidence to allow a jury to find beyond a reasonable doubt that defendant intentionally used a deadly weapon to cause the death of the victim. Defendant argues that he acted in self-defense. Self-defense has four essential elements. A person acts in self-defense if at the time of the killing:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (citations omitted).

Two of the four criteria for self-defense are lacking when the evidence is viewed in a light most favorable to the State.

The evidence does not indicate that defendant was reasonable in his belief that he needed to shoot the victim at least five times to prevent his own death or great bodily harm. *See Id.* at 530, 279 S.E.2d at 572 (requiring that a defendant's belief that the use of deadly force was necessary be reasonable). Moreover, the State's evidence indicates that two of the five shots were fatal and that defendant shot the victim while he was lying on the ground. Thus, there is no indication that defendant did not use excessive force. *Id.* at 530, 279 S.E.2d at 572-573 (requiring that a defendant's use of force not be excessive). Under these circumstances, the trial court properly found that the State had met its burden to establish second-degree murder and, therefore, did not err in denying defendant's motion to dismiss.

No error.

Judges HUNTER, Jr., Robert N., and BEASLEY concur.

Report per Rule 30(e).