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NO. COA11-1245
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. Jackson County
No. 07 CRS 51506

JAMES KEATON PICKLESIMER

Appeal by Defendant from judgment entered 21 February 2011 by Judge Gary M. Gavenus in Superior Court, Jackson County. Heard in the Court of Appeals 24 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Belser Law Firm, PLLC, by David Belser, for Defendant.

McGEE, Judge.

George Gunter (Mr. Gunter) was shot and killed in the town of Cashiers, North Carolina on 17 May 2007. James Keaton Picklesimer (Defendant) was indicted for the first-degree murder of Mr. Gunter on 11 June 2007. Defendant was found guilty on 21 February 2011 and sentenced to life imprisonment without parole. Defendant appeals.

The State's evidence presented at trial tended to establish the following facts. Judy Newton (Ms. Newton), a witness for the State, testified that she had known Mr. Gunter since about 1994 or 1995. They operated a business together in which they constructed and rented cabins on property (the property) located in the Whiteside Cove area of Cashiers.

Ms. Newton, Mr. Gunter, and Defendant resided on the property, but lived in different cabins. Ms. Newton testified Mr. Gunter lived in the "main house," the only cabin with cable television, and that she and Defendant lived in a nearby cabin. Ms. Newton testified she frequently conducted business and performed chores out of the main house. Ms. Newton began asking Mr. Gunter to move out of the main house in 2003.

Ms. Newton testified she had a brief romantic relationship with Mr. Gunter, but was never married to him. She said that, at the time of Mr. Gunter's death and at the time of trial, she was in a romantic relationship with Defendant.

On the day of the shooting, Ms. Newton told Mr. Gunter that she and Defendant would be watching television in the main house that evening. Another witness testified that Ms. Newton told her that Mr. Gunter, on the night of the shooting, "was very upset because he said that the television was bothering him[.]" Ms. Newton testified that while she and Defendant were watching

television that evening, Mr. Gunter came downstairs and Ms. Newton told Defendant they should leave. Ms. Newton said she then exited the room and entered the kitchen, and heard a noise. Ms. Newton reentered the room and saw Defendant holding a gun, and Mr. Gunter lying on the floor. Ms. Newton testified that she kept a gun in a pile of blankets in the room.

A Jackson County 911 telecommunicator received a call from Ms. Newton at 10:21 p.m. on 17 May 2007. Ms. Newton told the 911 telecommunicator that someone had been shot. The 911 telecommunicator testified that Ms. Newton identified Defendant as the shooter.

Sergeant Steven Watson (Sergeant Watson) and Lieutenant Clyde Rice (Lieutenant Rice) were dispatched to the scene. Upon arrival, the officers found Defendant and Ms. Newton in the yard in front of the main house. Sergeant Watson asked them where the gun was located, and Defendant replied that it was leaning against the couch. Sergeant Watson then entered the main house and Lieutenant Rice remained outside with Defendant and Ms. Newton. Sergeant Watson found Mr. Gunter lying face down against a wall. Sergeant Watson testified that he saw large amounts of blood and what appeared to be brain matter. He also testified that he found a lever action rifle on the floor near the couch.

Lieutenant Rice testified that, after Sergeant Watson returned, he informed Defendant that he would be detained as part of the investigation, but that he was not under arrest. Lieutenant Rice testified that he informed Defendant of his *Miranda* rights. Defendant replied only by saying, "I will cause you no problems." Sergeant Watson then placed Defendant in his patrol car.

Lieutenant Rice returned to Mr. Gunter, preformed a pat-down, and found a pistol in Mr. Gunter's right front pocket. There were nine live rounds in the magazine of the pistol, but no rounds in the chamber. A number of guns were also discovered in a gun safe in the main house.

The State also called Jim McClelland (Mr. McClelland), a crime scene analyst with the North Carolina State Bureau of Investigation. Mr. McClelland testified that he examined the scene of the shooting on 17 May 2007. He testified that he found a bullet fragment in the wall located three feet and seven inches above the floor.

The State also called Patrick Lantz, M.D. (Dr. Lantz) who examined the gunshot wound to Mr. Gunter's head. Dr. Lantz testified that Mr. Gunter was seventy-three years old, weighed approximately 190 pounds, and was 5-feet, 9-1/2 inches tall. Dr. Lantz testified that the entrance wound was at the base of

the skull in the back of Mr. Gunter's head, and the exit wound was through his forehead. Dr. Lantz testified the shot most likely came from twelve to eighteen inches away.

The State presented evidence that Mr. Gunter suffered from chronic health problems. Before his death, Mr. Gunter was placed on supplemental oxygen and had been prescribed several pain medications. The State called Ruth Winecker, Ph.D. (Dr. Winecker), the chief toxicologist at the Office of the Medical Examiner in Chapel Hill, North Carolina. Dr. Winecker testified that there was no indication of alcohol in Mr. Gunter's toxicology report. However, Dr. Winecker testified that the toxicology report indicated the presence of caffeine and hydrocodone. Dr. Winecker opined that the amount of hydrocodone detected in Mr. Gunter was "equivalent to a prescribed dosage[.]"

Jay Gains (Mr. Gains), a heating and air conditioning service contractor who worked on the Whiteside Cove cabins, testified that he witnessed an argument between Defendant and Mr. Gunter. Mr. Gains testified that Defendant and Mr. Gunter did not exchange blows, and that he did not hear Defendant and Mr. Gunter exchange any threats.

Defendant presented evidence that, in the past, Mr. Gunter had made threats against Defendant's life. George Entwisle (Mr.

Entwisle) testified that Mr. Gunter, while talking about Defendant, stated: "I'm going to have to kill the son of a bitch." Mr. Entwisle testified he told Defendant about this statement by Mr. Gunter.

I. Issues on Appeal

Defendant raises two issues on appeal. First, Defendant argues that "the trial court committed plain error in allowing the State to elicit evidence that . . . Defendant, after being taken into custody for investigation and advised of his [*Miranda*] rights, remained silent and made no statement about what had happened." Second, Defendant argues that:

> The trial court committed reversible error in denying . . . Defendant's motions to dismiss the charge of first degree[-]murder because the evidence was insufficient to convince a rational trier of fact of each element of the offense beyond a reasonable doubt, and insufficient to establish that . . . Defendant did not act in self[-]defense, thereby denying him his federal and state constitutional rights to a fair trial and due process of law.

II. Use of Defendant's Silence

Defendant argues that "the trial court committed plain error in allowing the [S]tate to elicit evidence that . . . Defendant, after being taken into custody for investigation and advised of his [*Miranda*] rights, remained silent and made no statement about what had happened."

As Defendant made no objection at trial, we are limited to reviewing Defendant's argument for plain error. *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010).

> In order to establish plain error [d]efendant must show that the error was so fundamental that it had a probable impact on the result reached by the jury. Plain error is error so fundamental as to amount to a miscarriage of justice or probably resulted in the jury reaching a different verdict than it otherwise would have reached. Plain error review is limited to evidentiary rulings and jury instructions.

State v. Davis, 191 N.C. App. 535, 538, 664 S.E.2d 21, 23 (2008) (internal quotations marks and citations omitted).

Defendant complains about exchanges that occurred during the testimony of Sergeant Watson and Lieutenant Rice. On direct and redirect examination of Sergeant Watson, the following exchanges occurred:

> Q. Did [Defendant] make any unsolicited or spontaneous statements to you --
>
> A. He didn't say anything --
>
> Q. -- about what had happened?
>
> A. He didn't say anything to me other than he asked for a drink of water and to go to the restroom.
>
> Q. And did you have any other contact with . . . [D]efendant after he was placed in your car?
>
> A. I would periodically go back and check on

> him and see if he needed anything to drink or needed to go to the bathroom again.
>
> . . . .
>
> Q. Did you ask him any questions after he was transported?
>
> A. I didn't ask him anything but just his pertinent information enough for my report, sir.
>
> Q. And why did you not ask him any questions on the way down?
>
> A. Because I'm not -- I'm not a detective, sir. That's -- that's their -- I mean, I'm just transporting him to the jail.
>
> Q. Did you know at that point that he had invoked his rights?
>
> A. No, sir. I didn't know if he had invoked his right or not.

The direct examination of Lieutenant Rice included the following exchanges:

> A. [W]hen Officer Watson came back with his vehicle, I told [Defendant] that I was going to place him in the patrol car, and I advised him of his *Miranda* rights. The only thing [Defendant] had to say to me at that time was, "I will cause you no problems.["] So I then asked Officer Watson to place [Defendant] in his patrol car, and he did.
>
> . . . .
>
> Q. Now, after you read . . . [D]efendant his rights, did he ever make any unsolicited spontaneous statements to you?
>
> A. No, he did not.

> Q. Will you please describe . . . [D]efendant . . . his demeanor when you first started talking to him when you approached him.
>
> A. [Defendant] appeared to me to be calm. He was polite. When I told him what I was going to do, he didn't try to resist me in any way. He was very quiet.

We must determine if these exchanges amounted to plain error. "[P]roper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest." *State v. Boston*, 191 N.C. App. 637, 651, 663 S.E.2d 886, 896 (2008). "The use of prearrest silence to impeach a defendant's credibility on cross-examination does not violate the Fifth or Fourteenth Amendment to the United States Constitution." *State v. Bishop*, 346 N.C. 365, 386, 488 S.E.2d 769, 780 (1997) (citing *Jenkins v. Anderson*, 447 U.S. 231, 235–40, 2127–30 (1980)). Pre-arrest statements are likewise permissible for impeachment purposes under state law. *Id.* at 387, 488 S.E.2d at 780. However, "[t]he only permissible purpose for such [pre-arrest] evidence is impeachment." *Mendoza*, 206 N.C. App. at 392, 698 S.E.2d at 172. *See also Boston*, 191 N.C. App. at 649 n.3, 663 S.E.2d at 894 n.3 ("The State's purpose in eliciting the challenged

testimony was clearly not to impeach [the defendant's] credibility or alibi . . . [where the defendant] did not testify at trial and presented no other evidence on her behalf.").

Defendant relies on *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980). In *Lane*, during cross-examination, the State "attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that defendant's defense of alibi was an after-the-fact creation." *Id.* at 387, 271 S.E.2d at 277. In *Lane*, "the defense of alibi was crucial to defendant's case, and it seems probable that the cross-examination concerning his failure to relate his defense of alibi prior to trial substantially contributed to his conviction." *Id.*

Our Supreme Court, in *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994), addressed an analogous situation. In the present case, Defendant, as in *Alexander*, "did not object to the line of questioning at issue, the comments were relatively benign, and a review of the record indicates that the prosecutor made no attempt to emphasize the fact that defendants did not speak with them after having been arrested." *Id.* at 196, 446 S.E.2d at 91. The Court in *Alexander* concluded that "[t]he impropriety of the comments was not sufficient to warrant a new trial[.]" *Id.* *See also Mendoza*, 206 N.C. App. at 392, 698

S.E.2d at 172 (concluding that use of defendant's silence "did not rise to the level of plain error given the substantial evidence pointing to defendant's guilt").

In the present case, the State did not "attack[] [D]efendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury" of Defendant's guilt based on his silence. *Lane*, 301 N.C. at 387, 271 S.E.2d at 277. The testimony of both Sergeant Watson and Lieutenant Rice indicated that neither of them questioned Defendant extensively about his role in the death of Mr. Gunter. When taken in the context of the trial, the comments were "relatively benign" and it is not apparent from the record that the State made any "attempt to emphasize" Defendant's lack of spontaneous, unsolicited comments. *Alexander*, 337 N.C. at 196, 446 S.E.2d at 91. Further, the challenged testimony does not seem to lend a strong inference in favor of or against Defendant. None of the testimony examined shows that Defendant chose not to respond to a question posed by Sergeant Watson or Lieutenant Rice. Rather, the testimony revealed that Defendant did not make any spontaneous, unsolicited statements. Therefore, we cannot say, given the weight of the other evidence and testimony presented at trial, that the absence of the

challenged testimony would have caused the jury to reach a different result. Therefore, we hold there was no plain error.

III. Sufficiency of Proof

Defendant's next assignment of error is that:

> The trial court committed reversible error in denying . . . Defendant's motions to dismiss the charge of first[-]degree murder because the evidence was insufficient to convince a rational trier of fact of each element of the offense beyond a reasonable doubt, and insufficient to establish that . . . Defendant did not act in self[-]defense, thereby denying him his federal and state constitutional rights to a fair trial and due process of law.

At the close of the State's evidence, Defendant made a motion to dismiss, arguing that the State failed to prove the elements of premeditation and deliberation beyond a reasonable doubt. Defendant renewed this motion at the close of all of the evidence. "This Court applies [a] *de novo* standard of review when considering whether the State presented substantial evidence to establish each element of the offense and demonstrate that defendant was the perpetrator." *State v. Kirby*, 206 N.C. App. 446, 452, 697 S.E.2d 496, 501 (2010).

> "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the

> evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion."

State v. Vause, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citations omitted).

Defendant was charged with first-degree murder. "Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Burgess*, 345 N.C. 372, 386, 480 S.E.2d 638, 645 (1997) (citation omitted).

> To convict of first degree murder, the State must prove beyond a reasonable doubt that the defendant formed a specific intent to kill after premeditation and deliberation. . . . Premeditation means that the defendant thought about killing the victim for some period of time, however short, before the killing. . . . Deliberation means the execution of an intent to kill in a cool state of blood without legal provocation and in furtherance of a fixed design; it does not require reflection for any appreciable length of time. . . . Among the circumstances to be considered to determine whether a defendant acted after premeditation and deliberation are the want of provocation by the victim, the defendant's conduct before and after the killing, and the nature and number of wounds[.]"

State v. Bray, 321 N.C. 663, 671, 365 S.E.2d 571, 576 (1988). The issues of premeditation and deliberation appear to be at issue in this case.

> Premeditation and deliberation are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence. . . . Among the circumstances from which premeditation and deliberation may properly be inferred in a prosecution for first-degree murder are: (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Dennison, 171 N.C. App. 504, 509, 615 S.E.2d 404, 407-08 (2005) (citations omitted).

The State presented testimony that Defendant shot and killed Mr. Gunter. In Ms. Newton's call to the emergency dispatcher, she identified Defendant as the shooter. This evidence is sufficient to establish that Defendant shot and killed Mr. Gunter.

We also must decide whether the State presented sufficient evidence that Defendant acted with premeditation and deliberation. The State presented circumstantial evidence that Mr. Gunter was most likely shot from a range of twelve to eighteen inches away. The State presented evidence that the

entrance wound was in the back of Mr. Gunter's head. From these facts, one can infer that Mr. Gunter had, at the time of the "lethal blows," been "rendered helpless." *Id.* The State also presented evidence of "ill-will [and] previous difficulties between the parties[.]" *Id.* There was also evidence of a verbal altercation between Defendant and Mr. Gunter. Therefore, we hold that there was sufficient circumstantial evidence that Defendant acted with premeditation and deliberation.

The issue of self-defense was also submitted to the jury. Once instructed on the issue of self-defense, a "jury may return a verdict of guilty only if it finds that the State proved beyond a reasonable doubt that defendant did not act in self-defense." *State v. Moore*, 363 N.C. 793, 797, 688 S.E.2d 447, 450 (2010). A defendant is excused by reason of self-defense if four elements are met:

> (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 that 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. Richardson, 341 N.C. 585, 588, 461 S.E.2d 724, 726 (1995) (citations omitted).

The evidence indicates that Mr. Gunter was in a defenseless position at the time of the shooting because the lethal shot entered through the back of Mr. Gunter's head. Because Ms. Newton was able to leave the scene without incident, the State presented sufficient evidence for a jury to conclude beyond a reasonable doubt that Defendant did not act in self-defense. Based on the forgoing, we hold that the trial court did not err in denying Defendant's motions to dismiss.

No error.

Judges STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).