NO. COA12-220
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

STATE OF NORTH CAROLINA

v. Wayne County
No. 09 CRS 54072

MOHSSEN ALMOGADED

Appeal by defendant from judgment entered 3 June 2011 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Valerie L. Bateman and Associate Attorney General Christina E. Simpson, for the State.

Appellate Defender Staples Hughes, by Anne Bleyman, for defendant.

ELMORE, Judge.

Mohssen Almogaded (defendant) appeals from judgment entered upon a jury conviction of second-degree murder. After careful consideration, we find no error.

I. Background

Terry Singleton (the victim) was a regular shopper at a convenience store managed by defendant. Problems arose with the victim's regular visits to the store beginning in February 2009. During one of his visits to the store, the victim did not have enough money to complete his purchase, after having previously purchased beer from the store on credit. The victim asked defendant if he could come back later in the day to pay the difference, to which defendant told the victim to leave the store.

Later, the victim's girlfriend, Shernetta Atkins, convinced him to return to the store with her to pay the amount owed and to make other purchases. The next day, the victim and Atkins returned to the store. At that time, defendant did not make any comment about the victim's presence in the store. However, later that night, officers visited the victim's home and told him that defendant did not want him to return to the store again.

Despite this warning, on 29 June 2009, Atkins and the victim stopped by defendant's store to buy some snacks. The victim remained in the car while Atkins started walking to the store. The facts regarding what happened next are heavily

disputed. What follows is a summary of the accounts as given by both Atkins and defendant at trial.

According to Atkins's testimony, defendant came out of the store after she and the victim drove up, but defendant testified that he was already outside the store at that time. Atkins testified that defendant went up to the car and told the victim to exit the vehicle. Defendant testified that as he approached the victim's vehicle, the victim got out of the car and threatened him. Defendant then testified that he was scared, so he grabbed a knife he used to cut up boxes. Defendant also testified that the victim hit him in the face several times. Atkins testified that the victim never touched defendant. Atkins then testified that defendant chased the victim and then stabbed him. Defendant testified that he and the victim began hitting, kicking, and shoving each other and that the victim was attempting to grab the knife while strangling him. Defendant admits that he then stabbed the victim. The victim was then transported to Wayne Memorial Hospital where he later died from a stab wound to his left back area.

On 6 December 2010, defendant was charged with first-degree murder. On 31 May 2011, the case came on for trial in Wayne County Superior Court. At trial, the State called Atkins to

testify. On cross-examination of Atkins, defendant's attorney attempted to elicit testimony from her concerning the victim's violent reputation as well as his criminal record. The State objected, and the objection was sustained. Defendant also testified at trial, asserting that he killed the victim in self-defense.

On 3 June 2011 the jury returned a verdict of guilty of second-degree murder. Defendant was then sentenced to a term of 157 to 198 months imprisonment. Defendant now appeals.

II. Arguments

A. Evidence of the victim's violent character and criminal record

Defendant's first two arguments on appeal pertain to a line of questioning asked during cross-examination of the State's witness, Atkins. That questioning occurred as follows.

First, defendant's attorney asked Atkins "[the victim] had a reputation for being violent, didn't he?" The State objected, but Atkins replied over the objection, "no." The trial court then allowed defendant's attorney to continue with his line of questioning outside the presence of the jury. The trial court reasoned that "I will allow those questions to be asked for

consideration by this Court as to whether they should be admissible at this stage of the proceedings."

Defendant's attorney then asked Atkins "I asked you if Terry had a reputation for being violent. . . . and you said no[]" but "he has previously been convicted of assaulting you, hasn't he?" Atkins replied, "no, he wasn't convicted." Defendant's attorney then entered into evidence a copy of a warrant for the victim's arrest, taken out in 2000 for hitting Atkins. Defendant's attorney also entered into evidence a copy of the judgment from that case in which defendant pled guilty to assaulting Atkins. Defendant's attorney then questioned Atkins concerning both documents, asking "does Defendant's Exhibit 3 for Voir Dire appear to be a judgment that he pled guilty to assaulting you[?]" Atkins replied "yes."

The trial court then sustained the State's prior objection. The trial court reasoned that "you [defendant] have properly given notice of the defense of self-defense. There is no question that that notice has been given; and I think for this issue to come up and for me to consider it, it would be more appropriate at such time as evidence is presented as to that issue, and I would certainly consider this as to what to do with it or how you present at a later point in the trial[.]"

i. Reputation for violence

Defendant first argues that the trial court erred in excluding evidence of the victim's violent reputation. We disagree.

This Court has held that:

> [w]hile evidence of character is generally inadmissible, N.C.R. Evid. 404(a)(2) provides that evidence of pertinent character traits of a victim offered by an accused is admissible. N.C.R. Evid. 405(b) allows for proof of character by evidence of specific instances of conduct in cases where character is an essential element of a charge, claim or defense. Where defendant argues 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.

State v. Ray, 125 N.C. App. 721, 725, 482 S.E.2d 755, 758 (1997) (quotations and citations omitted).

Here, it is clear from the record that the trial court made a reasoned decision in determining that the evidence would be inappropriate at such an early stage in the trial, because defendant had not yet presented any evidence of self-defense. Further, the trial court invited defendant to introduce the reputation evidence again later, during his case-in-chief, which defendant failed to do. As such, we are unable to agree that the trial court erred.

ii. Impeachment with the victim's criminal record

Defendant next argues that the trial court erred in preventing defendant from challenging the credibility of Atkins, by excluding evidence of the victim's prior assault conviction. Again, we disagree.

Rule 609 of our Rules of Evidence governs the admissibility of evidence of prior convictions for impeachment purposes. According to that rule, "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen Stat. § 8C-1, Rule 609 (2012). However, nothing in Rule 609 governs the impeachment of a witness with the criminal conviction of a *third party*.

Defendant appears to contend that evidence of the victim's criminal record was relevant to impeach Atkins's credibility, because Atkins testified that the victim did not have a violent reputation despite having been convicted of assault. We are not persuaded by this argument.

Our Courts have long understood a person's reputation to be how that person is perceived in the community. *See State v.*

Morrison, 84 N.C. App. 41, 47, 351 S.E.2d 810, 814 (1987) (noting that "before a witness may testify as to another witness's reputation, a foundation must be laid showing that the testifying witness has sufficient contact with the community to enable him to be qualified as knowing the general reputation of the person in question."). Thus, the fact that the victim was previously convicted of assault, in and of itself, does not necessarily prove or establish that the victim was known in general to be violent. As such, again we are unable to agree that the trial court erred.

C. Jury Instructions

Defendant next argues that the trial court committed plain error in failing to properly instruct the jury on voluntary manslaughter. In the instant case, defendant requested a jury instruction on voluntary manslaughter. During the jury instructions, the trial court stated:

> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and without deliberation. For you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt: First, that the defendant killed the victim by an intentional and unlawful act. Second, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not

> have occurred. And third, that the defendant did not act in self-defense or though acting in self-defense was the aggressor or though acting in self-defense used excessive force. Voluntary manslaughter is also committed if the defendant kills in self-defense but uses excessive force under the circumstances or was the aggressor without murderous intent in bringing on the fight in which the killing took place. Now the burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, used excessive force, or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.

Defendant argues that this instruction was ineffective, because it failed to include any mention of the doctrine of "heat of passion." We disagree.

> [I]n North Carolina, a defendant is entitled to have a lesser included offense only when there is evidence to support that lesser included offense. The doctrine of heat of passion is meant to reduce murder to manslaughter when defendant kills without premeditation and without malice, but rather under the influence of the heat of passion suddenly aroused which renders the mind temporarily incapable of cool reflection.

State v. Rainey, 154 N.C. App. 282, 290, 574 S.E.2d 25, 30 (2002) (quotations and citations omitted).

Here, defendant presented no evidence at trial to support the assertion that he stabbed the victim in the "heat of

passion." Instead, defendant's sole argument at trial was that he stabbed the victim in self-defense. Thus, defendant was not entitled to have the doctrine of "heat of passion" explained to the jury. As such, we conclude that it was proper for the trial court to instruct the jury on voluntary manslaughter only as it related to killing in self-defense.

D. Short-Form Indictment

Finally, defendant argues that the short-form indictment charging him with first-degree murder was fatally defective because it did not sufficiently allege the essential elements of the offense. We disagree, and we also note that our Courts have repeatedly rejected this argument.

In *State v. Braxton,* our Supreme Court noted that "indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions. . . . the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories[.]" *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L.Ed.2d 797, (2001). Our Supreme Court further held that the elements of "premeditation and deliberation [for first-degree murder]

need not be separately alleged in the short-form indictment." *Braxton*, 352 N.C. at 175, 531 S.E.2d at 438.

Here, defendant has failed to distinguish his case from *Braxton*. Thus, we conclude that the indictment here was sufficient to charge defendant with first-degree murder. Accordingly, we overrule defendant's argument.

III. Conclusion

In sum, we conclude that the trial court did not err in excluding evidence of the victim's violent character or criminal record. Further, we conclude that the trial court did not err in failing to instruct the jury on the doctrine of "heat of passion," because defendant presented no evidence at trial to support such instruction. Finally, we overrule defendant's argument regarding the sufficiency of the short-form indictment.

No error.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).