NO. COA12-443
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. New Hanover County
No. 10 CRS 50261

DENNIS BENJAMIN ROY

Appeal by defendant from judgment entered 18 November 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 27 September 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Dennis Benjamin Roy ("Defendant") appeals from judgment entered 18 November 2011 by Judge Charles H. Henry in New Hanover County Superior Court sentencing him to life in prison without parole for first-degree murder. On appeal, Defendant argues that the trial court erred by failing to instruct the jury on the lesser-included offense of second-degree murder. We

find no error.

I. Factual and Procedural History

The State's evidence tended to establish the following. Dennis Benjamin Roy ("Defendant") was renting a room in the home of a married couple, Carmine and Mary Bruno, on South Branch Road in Wilmington. During the period relevant to the occurrences discussed herein, Defendant was having an affair with Mrs. Bruno.

On 5 January 2010, Defendant arrived at the Bruno residence and saw Mr. and Mrs. Bruno watching television in the living room. Mr. Bruno "made [a] snide remark about [not making] a big mess in the bedroom, and . . . went on a tirade about closing the doors, and threatened . . . to beat [Defendant] up." Defendant ignored Mr. Bruno. After spending a few hours in his room thinking, Defendant went outside to smoke a cigarette. Defendant then went to sit down in the living room, at which point Mr. Bruno made a second threatening comment to Defendant. After a few minutes, Defendant made eye contact with Mrs. Bruno and the two of them went outside to smoke a cigarette and talk. Defendant began "ranting and raving" about Mr. Bruno at that time. Defendant said "something like . . . I wish he was dead"; Mrs. Bruno responded by noting that "people die all the time."

At this point, Mrs. Bruno "indicated a plan to do [Mr. Bruno] in[.]" Upon reentering the house, Defendant went upstairs and retrieved a baseball bat. Defendant returned to the living room to find Mr. Bruno asleep on a loveseat. Defendant, standing over Mr. Bruno, looked at Mrs. Bruno who "indicated [with] a nod of her head" in the affirmative to Defendant. Defendant then struck Mr. Bruno on the back of the head with the baseball bat. Defendant paused after this first blow when Mrs. Bruno screamed, but then continued to kill Mr. Bruno by beating him to death with the baseball bat.

Neither Defendant nor Mrs. Bruno called the police. Defendant moved Mr. Bruno's body into the kitchen, wrapped it in a shower curtain and blanket, and then took it to the garage. Defendant then cleaned up the scene of the killing before going to sleep. The following morning, Defendant and Mrs. Bruno continued cleaning the living room.

On 7 January 2010, two days after the killing, Mrs. Bruno called her brother, Herman Jackson, in what he would later describe as a state of hysteria. Mr. Jackson, unsure of the cause of his sister's hysteria, called emergency services and went over to Mrs. Bruno's residence. The fire department arrived and discovered the body of Mr. Bruno at the base of a

set of stairs near the garage. They secured the scene and called the police, who began an investigation that included the questioning of Defendant. A New Hanover County grand jury indicted Defendant for first-degree murder on 22 March 2010.

At trial, Defendant admitted killing Mr. Bruno; Defendant also corroborated many of the aforementioned facts in his testimony, including the manner in which he killed Mr. Bruno and where he left the body. Regarding Mr. Bruno, Defendant testified that he thought on at least one occasion that he would "like to kill that son of a bitch." Furthermore, Defendant admitted to having written a note sometime in December of 2009 that read: "I have the bat out on my bed. I came so close to using it on that foul-mouthed bastard. Okay. If I hear fuck one more time. Give me the okay, I will kill him. Say yes now."

Dr. John Blackshear, an expert in the field of psychology, testified that Defendant was under a lot of stress at the time of the killing. Blackshear concluded, after speaking with Defendant but without reviewing any of the State's discovery materials, that Defendant exploded under the pressure of stress, resulting in the murder of Mr. Bruno. At the jury charge conference, Defendant requested that the jury be instructed on

the lesser-included offense of second-degree murder. After hearing argument from both Defendant and the State, the trial court denied this request, and Defendant's counsel again objected for the record. The jury found Defendant guilty of first-degree murder.

II. Jurisdiction

Defendant appeals from the final judgment of a superior court where Defendant was convicted of a non-capital offense; thus, we have jurisdiction over Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

Defendant argues on appeal that the trial court committed reversible error by not instructing the jury on the lesser-included offense of second-degree murder. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). A jury instruction "on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and *to acquit him of the greater*." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (emphasis added). Relevant to the case

at bar:

> The well-established rule for submission of second-degree murder as a lesser-included offense of first-degree murder is: If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Locklear, 363 N.C. 438, 454–55, 681 S.E.2d 293, 306 (2009) (quotation omitted).

"Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Second-degree murder "is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979) (citing *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963)). Malice is defined as a mental state that motivates someone to take "the life of another intentionally without just cause, excuse or justification." *Fleming*, 296 N.C. at 562, 251 S.E.2d at 432. "Premeditation is defined as 'thought beforehand for some length of time no matter how short.'" *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986) (quoting

State v. Calloway, 305 N.C. 747, 751, 291 S.E.2d 622, 625 (1982)).

In his brief, Defendant does not contest that there is evidence of malice, noting that "[t]he intentional use of a baseball bat to kill the deceased proves . . . malice." However, he contends that the evidence would support a finding that he did not act with premeditation and deliberation, which are the elements that separate first from second-degree murder. Indeed, the "sole factor determining the judge's obligation to give . . . an instruction [on a lesser offense] is the presence, or absence, of *any evidence* in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Annadale*, 329 N.C. 557, 567, 406 S.E.2d 837, 843 (1991) (emphasis added) (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)). Thus, if all the evidence shows that Defendant acted with premeditation and deliberation, an instruction only on murder in the first degree is appropriate because a rational trier of fact could not find Defendant guilty of murder in the second-degree in the face of evidence showing only a premeditated and deliberate killing. *Id.*

Defendant acknowledges that he "had had previous thoughts

of killing the deceased before the date in question[,]" but argues on appeal that the jury could find that he did not premeditate and deliberate the killing because "he was agitated and upset" and because "he [did not] know what his state of mind was" at the time of the killing. Thus, Defendant contends that there is evidence of a lack of premeditation and deliberation in the present case for two reasons: (1) he was emotionally upset leading up to and during the murder, and (2) he does not remember what he was thinking at the time of the murder. Both of these contentions are without merit.

Even if Defendant at the time of the murder was "angry and upset," such emotion would be insufficient to create a conflict with the State's evidence of premeditation and deliberation. "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. Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). "[T]he term cool state of blood does not mean an absence of passion and emotion. One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large

extent controlled by passion at the time." *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (internal citations and quotations omitted). The presence of emotion prior to or during a murder does not negate the element of deliberation unless the Defendant was so emotional as to not have the ability to reason. *State v. Rios*, 169 N.C. App. 270, 280, 610 S.E.2d 764, 771 (2005). Defendant contends that the comments made by Mr. Bruno made him violently angry. If so, our case law holds that without further evidence of a loss of the ability to reason, anger alone is not sufficient to show the absence of premeditation and deliberation. "'Evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason.'" *Id.* (quoting *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785 (1995)). Thus, Defendant's statement that he was emotional leading up to and during the murder, by itself, does not support Defendant's contention that he was incapable of premeditating and deliberating upon his actions.

Defendant's second argument—that he does not recall what he was thinking at the time of the murder and thus could not have premeditated and deliberated the murder—is also without merit.

Even assuming that Defendant does not recall what he was thinking, "[w]ithout evidence showing that the defendant was *incapable* of deliberating his actions, the evidence could not support the lesser-included offense of second-degree murder." *Solomon*, 340 N.C. at 222, 456 S.E.2d at 785 (emphasis added). Defendant did not offer any evidence showing that he was "incapable of deliberating his actions," and the record reveals uncontroverted evidence that Defendant was actively premeditating and deliberating his actions up to and during the murder. Defendant testified to having contemplated killing Mr. Bruno prior to the night in question. Defendant testified to having a conversation with Mrs. Bruno just minutes prior to the murder in which they discussed "a plan to do [Mr. Bruno] in[.]" Defendant admitted to re-entering the house after having this conversation with Mrs. Bruno and immediately retrieving his baseball bat, the murder weapon. Defendant admitted to walking over to the victim, looking at Mrs. Bruno for affirmation, and then beating Mr. Bruno after receiving an encouraging nod from Mrs. Bruno. Defendant further testified that he momentarily paused after delivering the first blow because Mrs. Bruno screamed, only to return to striking Mr. Bruno in the head with the bat. These facts strongly indicate the presence of

thoughtful deliberation and premeditation, regardless of what Defendant does or does not remember about his mental state, meaning that a jury could not have rationally acquitted Defendant of first-degree murder. *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

Indeed, this Court has held:

> Premeditation and deliberation may be inferred by: lack of provocation on the part of the victim, the defendant's conduct, statements, and threats before the murder, and past ill will between the parties; bringing a weapon to the scene of the crime or anticipating a confrontation in which the defendant was prepared to use deadly force; the nature of the wounds, especially a fatal gunshot wound to the back of the head; flight from the scene, leaving the victim to die, and fabricating an alibi, discarding a weapon or other evidence suggesting guilt, or attempting to cover up any involvement in a crime.

State v. Miles, __ N.C. App. __, __, 730 S.E.2d 816, 829 (2012). Here, the State presented evidence of: (1) a lack of legal provocation, (2) threats prior to the murder, (3) past ill will between the parties, (4) Defendant bringing a murder weapon to the scene, (5) Defendant anticipating confrontation in which Defendant was prepared to use deadly force, (6) multiple wounds to the back of the head, (7) Defendant leaving the victim to die, (8) discarding evidence suggesting guilt, and (9) Defendant attempting to clean up the scene of the crime to cover up his

involvement therein.

The facts in the present case are not unlike those in *Locklear*, in which a defendant who was charged with murder also contended that he was entitled to a jury instruction on the lesser-included offense of second-degree murder. 363 N.C. at 438, 681 S.E.2d at 293. The defendant in *Locklear* became involved in a heated argument with the victim, reached an angry state of emotion, retrieved a two-by-four, and then proceeded to beat the victim to death with the piece of wood. *Id.* at 442, 681 S.E.2d at 299. The defendant in *Locklear* argued that because he killed the victim in a state of sudden anger, he did not therefore premeditate his actions and was thus entitled to an instruction on second-degree murder. *Id.* at 454, 681 S.E.2d at 306. Our Supreme Court disagreed, noting: (1) the presence of passion or emotion prior to or during a murder does not equate to a lack of premeditation or deliberation; (2) the lack of evidence suggesting the absence of premeditation or deliberation disallowed an instruction on second-degree murder; (3) a "self-serving statement" made by the defendant that he was angry at the time of the murder is insufficient to "support an instruction on second-degree murder[]"; and (4) numerous wounds of the same sort suggest the presence of premeditation because

the defendant "had . . . more time for thought and deliberation between each blow." *Id.* at 455-56, 681 S.E.2d at 306-07.

The facts in the present case are strikingly similar to those in *Locklear*. Defendant, as in *Locklear*, presented no evidence aside from his own self-serving statements to prove he was overcome by emotion at the time of the murder. Furthermore, even assuming the truth of these statements, such passion alone, as noted by the Court in *Locklear*, is not enough to negate premeditation and deliberation without further evidence that said passion was great enough to inhibit Defendant's ability to reason. Finally, the numerous head wounds found on Mr. Bruno in the present case are further evidence of premeditation and deliberation, just as they were in *Locklear*.

Thus, Defendant's contention that his anger and lack of memory negate the presence of premeditation and deliberation is without merit. Furthermore, there is considerable evidence suggesting Defendant thoughtfully and deliberately murdered Mr. Bruno. Accordingly, since there is no evidence in the record which would convince a rational trier of fact to acquit Defendant of first-degree while convicting him of second-degree murder, the trial court did not err in refusing to instruct the jury on the lesser-included offense of murder in the second-

degree. Accordingly, we find

NO ERROR.

Judges ERVIN and MCCULLOUGH concur.

Report per Rule 30(e).