NO. COA 13-205
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Onslow County
No. 10 CRS 57452

HOWARD BERNARD LEE
Defendant

Appeal by defendant from judgment entered 20 August 2012 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 29 August 2013.

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

Staples Hughes, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Defendant Howard Bernard Lee ("Defendant") appeals from his conviction of second degree murder. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: Defendant and Shirley Lee ("Mrs. Lee") were married on 9 December 1967. They had three daughters: Kimberly Richards ("Mrs. Richards"), Denise Siler ("Mrs. Siler"), and Rebecca Horst ("Mrs. Horst"). In December 2008, Defendant and his wife owned and operated a lawn care business together in Havelock, North Carolina. They then moved in with Mrs. Siler and her husband, Phillip Siler ("Mr. Siler"). After a brief stay with the Silers, Defendant and his wife moved into a homeless shelter. While living in the homeless shelter, they met Christopher Blasdell ("Mr. Blasdell") and the three of them moved into a used trailer located in Jacksonville, North Carolina. Mr. Blasdell moved out of the trailer after living there for one month.

At 8:30 a.m. on 6 November 2010, Defendant called 911 and told the dispatcher that Mrs. Lee had died in the trailer where they lived. Sergeant Pete Jackson ("Sergeant Jackson") was dispatched to the trailer. Upon his arrival, Defendant told Sergeant Jackson that he had fallen asleep on the couch, and when he woke up the next morning, he discovered that Mrs. Lee was dead. Sergeant Jackson walked through the trailer and observed Mrs. Lee lying on her bed, facing up in a "military

style position of attention[.]" Defendant told Sergeant Jackson that Mrs. Lee had suffered from various medical issues (one of which had led to the removal of her thyroid) and that she also had trouble walking and fell frequently. Defendant told Sergeant Jackson that three days earlier, Mrs. Lee had fallen while walking down the hallway and hit her head on a coffee table.

Deputy Sheriff John Dubois ("Deputy Dubois") subsequently arrived at the scene and was briefed by Sergeant Jackson. Deputy Dubois took photographs of the trailer's interior, including Mrs. Lee's bedroom and the hall leading to the bedroom.

On 8 November 2010, Dr. Anuradha Arcot ("Dr. Arcot") performed an autopsy on Mrs. Lee. Dr. Arcot determined that the cause of her death was "[b]lunt force trauma with a hemorrhage into body cavities, including both the right side of the chest and her abdomen." Dr. Arcot concluded that her death was a homicide.

Later that day, Detective Michael Gibbs ("Detective Gibbs") and Detective David South ("Detective South") drove Defendant to the Onslow County Sheriff's Office for questioning. The following day, Defendant was questioned a second time at the

Sheriff's Office while authorities executed a search warrant of Defendant's trailer.

Deputy Dubois noted and photographed red stains visible on the carpet in front of the couch in the living room and in several other areas inside the residence. He then performed two tests on the red stains. One test consisted of spraying Luminol on the objects and areas that were believed to contain blood but not visible to the naked eye. The second test used was a phenolphthalein test, which checks for the presence of hemoglobin.

The phenolphthalein test revealed that stains or spots on a chair, the inside of a glove, the outside of a washing machine, and a portion of the living room wall all contained hemoglobin. Samples were sent to the State Bureau of Investigation for DNA testing. Samples from the glove, the washing machine, and the living room wall ultimately tested positive for Mrs. Lee's DNA.

Defendant was read his Miranda rights, driven back to his trailer, and shown the results of the Luminol testing that had been completed. Defendant was charged with second degree murder on 9 November 2010 and was indicted by a grand jury on 10 April 2012. A jury trial was held during the August 2012 Criminal Session of Onslow County Superior Court.

At trial, Dr. Arcot was qualified as an expert witness in forensic pathology. She testified that a blunt force trauma fractured one of Mrs. Lee's ribs and lacerated her liver, causing internal bleeding that resulted in Mrs. Lee's death within "minutes to an hour." Dr. Arcot also testified that Mrs. Lee would have been in considerable pain before losing consciousness. When shown the photograph of Mrs. Lee's deceased body lying on the bed in a rigid position, Dr. Arcot testified that it was "very unlikely that she is sleeping peacefully in that position. She should respond in some manner to the injuries that she sustained."

On 20 August 2012, Defendant was found guilty of second-degree murder and was sentenced to 142-180 months incarceration. Defendant gave notice of appeal in open court.

Analysis

I. Denial of Motion To Dismiss

Defendant asserts on appeal that the trial court erred in denying his motion to dismiss for insufficient evidence of second degree murder. Whether the evidence is sufficient to withstand a motion to dismiss is a question of law that is reviewed *de novo* on appeal. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). A defendant's motion to

dismiss should be denied if there is substantial evidence of (1) each essential element of the offense charged; and (2) defendant being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "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). In ruling on a motion to dismiss, the trial court is required to view all the evidence – whether direct, circumstantial, or both – in the light most favorable to the State. *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Here, Defendant was convicted of second degree murder. Murder in the second degree is defined as the unlawful killing of a human being with malice but without premeditation and deliberation and is a lesser included offense of first degree murder. *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). "For a defendant to be guilty of second degree murder, the State must prove beyond a reasonable doubt that: 1. defendant killed the victim; 2. defendant acted intentionally and with malice;

and 3. defendant's act was a proximate cause of the victim's death." *State v. Bostic*, 121 N.C. App. 90, 98, 465 S.E.2d 20, 24 (1995).

We conclude that the State presented sufficient evidence to support the trial court's denial of Defendant's motion to dismiss. The State introduced evidence that Defendant, on two prior instances, hit Mrs. Lee and – on another occasion – choked her. Additionally, Defendant's daughters and their husbands testified that in December 2008 Defendant told his daughters that he had struck Mrs. Lee in the head.

Moreover, while being questioned by officers following Mrs. Lee's death, Defendant made statements to Captain Daughtry that "he [Defendant] was a monster and that he needed to be locked up." Captain Daughtry testified that Defendant "repeated several times that he was guilty, but could not recall the details of the incident . . . ." Defendant told Detective South "that he must have done it, because with that amount of blood, he must have done it."

In addition, the State presented the testimony of Mr. Blasdell who testified that Defendant told him while they were living in the homeless shelter that Defendant was "trying to kill his wife but didn't know about how to go about it" and that

"there were too many people around the shelter." Furthermore, Mr. and Mrs. Richards testified that Defendant had previously stated that "he had to knock some sense into Mrs. Lee."

Mrs. Siler also testified about an incident in 2008 when her mother (Mrs. Lee) and Defendant came to visit. When Mrs. Siler questioned Defendant about a big knot on the side of Mrs. Lee's face, he responded that "he had to teach her [Mrs. Lee] a lesson." Based on all of this evidence, we believe the State satisfied its burden of introducing evidence both that Defendant killed Mrs. Lee and that, in doing so, he acted with malice.

Finally, with regard to the State's duty to offer substantial evidence that Defendant's act was a proximate cause of the victim's death, we believe that the State likewise met its burden. To serve as a proximate cause of a victim's death, the defendant's act does not have to be the immediate cause of death; rather, this element is satisfied if the victim dies as a natural result of the defendant's act. *Bostic*, 121 N.C. App. at 100, 465 S.E.2d at 25 (1995).

Here, Dr. Arcot testified that Mrs. Lee had a fractured rib caused by blunt force trauma. Dr. Arcot also testified that the fractured rib lacerated Mrs. Lee's liver, causing internal bleeding and resulting in her death. Moreover, Dr. Arcot

determined the cause of death to be a homicide. This evidence, in addition to the evidence set out above, supports the notion that a reasonable juror could have determined that Defendant's acts were the proximate cause of Mrs. Lee's death.

Defendant points to the following facts in arguing that the proximate cause element was not satisfied: (1) Mrs. Lee had fallen on previous occasions; (2) Dr. Arcot testified that she did not know the exact cause of the blunt trauma; and (3) no external marks were found on Mrs. Lee's body. Based on this evidence, Defendant claims that Mrs. Lee's injuries could have been sustained by her general infirmity as opposed to an act committed by Mr. Lee.

However, our Supreme Court has held that "contradictions and discrepancies are for the jury to resolve" and do not – without more - warrant dismissal of criminal charges. *State v. Hamlet*, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984). Furthermore, while substantial evidence of the elements of the crime must be shown, it "need not exclude every reasonable hypothesis of innocence." *Id.* We must instead view the evidence in the light most favorable to the State, and the State is entitled to every inference that may be reasonably deduced

from the facts. *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977).

We hold that the evidence, when viewed in the light most favorable to the State, raised a jury question as to whether Defendant killed Mrs. Lee intentionally and with malice and whether his acts were the proximate cause of her death. Therefore, the trial court properly denied Defendant's motion to dismiss.

II. Ineffective Assistance of Counsel

Defendant next contends he was denied his constitutional right to effective assistance of counsel. In support of his claim, he argues that his trial counsel failed to properly renew his motion to dismiss for insufficient evidence at the close of all the evidence.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This is so because this Court, in reviewing the record, is "without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor[,] that could be provided in a full

evidentiary hearing on a motion for appropriate relief." *Id.* at 554-55, 557 S.E.2d at 547 (alteration in original) (citation and quotation marks omitted). However, ineffective assistance of counsel claims are appropriately reviewed on direct appeal "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted), *cert. denied*, 546 U.S. 48, 163 L.Ed.2d 80 (2005).

Defendant's ineffective assistance of counsel claims here fall into the latter category because our analysis of his claim does not require additional evidence beyond what is contained in the record on appeal. *See State v. Phillips*, 365 N.C. 103, 144, 711 S.E.2d 122, 151 (2011) ("The incidents that defendant here argues constitute ineffective assistance of counsel may be determined from the record on appeal, so we can address them on the merits without the necessity to remand for an evidentiary hearing."), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

In order to establish ineffective assistance of counsel, "a defendant must show that (1) 'counsel's performance was deficient' and (2) 'the deficient performance prejudiced the

defense.'" *Id.* at 118, 711 S.E.2d at 135 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

Based on our review of the transcript, it appears that Defendant's trial counsel did, in fact, renew his motion to dismiss at the close of all the evidence. However, even assuming *arguendo* that defense counsel failed to properly renew the motion, the motion – if appropriately renewed – would still have been denied because, as explained above, the evidence presented by the State was sufficient to raise a jury question as to whether Defendant was guilty of second degree murder. Because Defendant cannot establish prejudice by the alleged error, we conclude that his ineffective assistance of counsel claim lacks merit. *See State v. Fraley*, 202 N.C. App. 457, 467,

688 S.E.2d 778, 786, *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010) ("[I]f the evidence is sufficient to support a conviction, the defendant is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence.").

III. Admission of Blood Stains at Trial

In Defendant's final argument on appeal, he argues that the trial court erred by allowing the State to introduce evidence of blood stains that were not definitively linked to Mrs. Lee. At the outset, we note that Defendant did not object to the admission of this evidence at trial. Accordingly, we review this argument only for plain error. N.C.R. App. P. 10(a)(4). To successfully establish plain error, a "defendant must demonstrate that a fundamental error occurred at trial" – meaning that the error was such that it "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*,

136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). It is well settled that in a criminal case, any evidence which sheds light upon the alleged crime is admissible. *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 327 (2005). Moreover, evidence meets the test of relevancy if it has any logical tendency, however slight, to prove a fact in issue. *State v. Lloyd*, 187 N.C. App. 174, 177, 652 S.E.2d 299, 301 (2007), *cert. denied*, 363 N.C. 586, 683 S.E.2d 214 (2009).

Even assuming *arguendo* that the trial court erred in admitting evidence of blood stains that were not adequately linked to Mrs. Lee's death, we do not believe that any such error rose to the level of plain error. Here, the State presented evidence of (1) previous physical abuse between Mrs. Lee and Defendant; (2) statements by the Defendant that "he must have done it" and that he was "trying to kill his wife"; and (3) expert testimony that Mrs. Lee's death was a homicide. In light of this overwhelming evidence of guilt, any error in the admission of evidence concerning the blood stains was not so fundamental that it had a probable impact on the jury's finding

that the Defendant was guilty. Accordingly, Defendant cannot show plain error.

Conclusion

For the reasons stated above, we hold that the Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).