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NO. COA14-383
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Pasquotank County
No. 10 CRS 051675

CHRISTOPHER DAVID AMYX

Appeal by defendant from judgment entered 23 July 2013 by Judge J. Carlton Cole in Pasquotank County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd, for the State.

George B. Currin and Catherine A. Hofmann for defendant-appellant.

BRYANT, Judge.

Where the trial court properly excluded testimony about the victim's character as untimely, and properly admitted testimony reflecting the victim's state of mind, and where the evidence showed premeditation and deliberation and a lack of self-defense, the trial court did not err in its rulings. Where the prosecutor's remarks during closing arguments were not

prejudicial, it was not error for the trial court to fail to intervene *ex mero motu*. Where the trial court's statements and instructions to the jury were not prejudicial, they did not constitute plain error.

On 3 October 2010, defendant Christopher David Amyx shot and killed Johnathan Schipper ("Johnathan") in defendant's dorm room at Mid-Atlantic Christian University ("MACU") in Elizabeth City. Former roommates, both defendant and Johnathan were students at MACU and lived in the same dormitory.

When Officer W.D. Harris of the Elizabeth City Police Department arrived at the scene, he found defendant sitting in the hallway. Four to five feet away lay a disassembled Glock .45 caliber pistol. When Officer Harris asked where and who the shooter was, defendant raised his hand and claimed responsibility.

Defendant told Officer Harris that he had shot Johnathan in self-defense. Defendant stated that he was at his desk playing a video game when Johnathan entered defendant's room. Defendant, who had been sitting with his back to the door, turned and saw Johnathan. Defendant stated that he immediately felt something was wrong. Johnathan, allegedly breathing heavily and with a "thousand-yard stare," placed his camouflaged

Bible on defendant's sink before pulling a knife and saying "it's time."

Defendant testified that "I knew that if I did not defend myself in the fastest way possible, then he would kill me." Defendant drew his semi-automatic pistol and shot Johnathan between the eyes.

Immediately after shooting Johnathan, defendant asked another MACU student to call 9-1-1 and to say that Johnathan had tried to stab defendant. Defendant also told the student to tell the police that defendant was a law enforcement officer and that he had rendered his gun safe after the shooting. At the time, defendant worked weekends for the Pinetops Police Department.

On 23 July 2013, a jury convicted defendant of one count of first-degree murder. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant appeals.

On appeal, defendant questions whether the trial court erred: (I) in the admission and exclusion of evidence; (II) in denying defendant's motion to dismiss for insufficiency of the evidence; (III) in failing to intervene *ex mero motu* during the

prosecutor's closing argument; and (IV) in its jury instructions.

I.

Defendant argues that the trial court erred in the admission and exclusion of certain evidence. We disagree.

When a trial court admits or excludes evidence based on relevancy, its rulings are technically not discretionary. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). Nevertheless, on appeal, relevancy decisions are given great deference. *Id.* Such deference recognizes that "the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004).

Victim Character Evidence

Defendant contends the trial court erred in excluding evidence regarding Johnathan's character. Pursuant to our North Carolina Rules of Evidence, relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen.

Stat. § 8C-1, Rule 401 (2013). When the proffered evidence concerns a victim's violent character, "[t]he relevancy of such evidence stems from the fact that in order to sustain a plea of self-defense, it must be made to appear to the jury that the accused was not the aggressor." *State v. Watson*, 338 N.C. 168, 188, 449 S.E.2d 694, 706 (1994), *overruled on other grounds by State v. Richardson*, 341 N.C. 585, 597, 461 S.E.2d 724, 732 (1995). Such evidence may be used to prove a defendant's state of mind, and is relevant only to the extent of showing that the defendant had knowledge of the victim's violent character. *Id.* at 187, 449 S.E.2d at 706.

"A victim's reputation for violence is relevant [only] after the self-defense issue has been raised [by defendant]." *State v. Hammonds*, 61 N.C. App. 615, 615-16, 301 S.E.2d 457, 458 (1983) (citation omitted). As long as it does not "preclude questioning regarding the subject at a later time," it is well within the court's discretion to limit the scope of cross-examination until the defense presents evidence of self-defense. *State v. Tann*, 57 N.C. App. 527, 531-32, 291 S.E.2d 824, 827 (1982).

Here, during cross-examination of the State's first witness, Ryan Puterbaugh, defendant sought to question him

regarding Johnathan's fascination with the comic book character Wolverine. After a *voir dire* examination, the trial court found that "[Puterbaugh's testimony] is not relevant when considering the testimony up to this point." In making its ruling, the trial court specifically stated that "I am not saying [defendant] that you may not be able to come back" to the Wolverine testimony. The trial court, therefore, left open the possibility that Puterbaugh could be recalled to testify to Johnathan's character when the evidence became otherwise relevant or when defendant put on evidence.

Jacob Smith also testified for the State. During cross-examination, defendant sought to question Smith about whether Johnathan had ever exhibited anger issues. Again, the trial court excluded testimony about Johnathan's character, holding that such evidence was not relevant unless and until defendant put on evidence of self-defense. The trial court, therefore, properly excluded evidence of Johnathan's character at that point of the trial. See *Tann*, 57 N.C. App. at 531-32, 291 S.E.2d at 827. We, therefore, overrule this portion of defendant's argument.

Hearsay Statements

Defendant also argues that the trial court erred in admitting certain testimony from Puterbaugh and Betty Schipper, Johnathan's mother. Specifically, defendant contends the trial court erred in admitting hearsay testimony concerning statements Johnathan made prior to his death.

On appeal, a trial court's determination concerning whether an out-of-court statement qualifies as hearsay is reviewed *de novo*. *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011). Hearsay is any out-of-court statement offered for the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013).

A court may admit a hearsay statement if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed." *Id.* § 8C-1, Rule 803(3). A statement that "indicate[s] the victim's mental condition by showing the victim's fears, feelings, impressions, or experiences" also falls within the state of mind exception. *State v. Lathan*, 138 N.C. App. 234, 236, 530 S.E.2d 615, 618 (2000).

"The victim's state of mind is relevant if it bears directly on the victim's relationship with the defendant at the

time the victim was killed." *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997); see generally *State v. Stager*, 329 N.C. 278, 315, 406 S.E.2d 876, 897 (1991) (evidence of the victim's mental state is admissible when relevant). A victim's state of mind is also relevant if it "relates directly to circumstances giving rise to a potential confrontation with the defendant." *State v. McLemore*, 343 N.C. 240, 246, 470 S.E.2d 2, 5 (1996).

Puterbaugh testified that defendant teased and bullied Johnathan about his views on abortion and on perverted jokes so much that "the[ir] discussions would get a little heated." Puterbaugh maintained that "[Johnathan] felt he was kind of being picked on for what he believed" Such testimony fits the technical definition of hearsay. However, Puterbaugh's testimony falls within the exception for state of mind statements because the testimony speaks to the relationship between Johnathan and defendant. This testimony conveyed the victim's emotions in relation to defendant's actions and, therefore, was admissible evidence of Johnathan's state of mind. *State v. Marecek*, 130 N.C. App. 303, 306, 502 S.E.2d 634, 636 (1998).

Betty Schipper's testimony recounted that her son was upset about two separate instances in which defendant attempted to bully Johnathan into a fight. Ms. Schipper said that "[my son] just told me rather in a bit of *frustration*, not *anger* that [defendant] would often bully him into trying to fight either [defendant] or somebody else." (emphasis added). By describing Johnathan's statements as expressing frustration, Ms. Schipper's testimony, like that of Puterbaugh, contained statements of emotion which showed her son's state of mind. Ms. Schipper's testimony was also relevant as it depicted the hostile relationship between Johnathan and defendant. Accordingly, the trial court did not err in admitting the challenged evidence based on the state of mind exception to the hearsay rule.

II.

Defendant next argues the trial court erred by failing to grant defendant's motion to dismiss for insufficiency of the evidence. 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). Review of a motion to dismiss requires determination of whether substantial evidence exists "(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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (1980) (citation omitted). In making this determination, evidence must be considered in the light most favorable to the State, which receives the benefit of every reasonable inference and the resolution of any contradictions in its favor. *State v. Billinger*, 213 N.C. App. 249, 253, 714 S.E.2d 201, 205 (2011) (citation omitted). Also, "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

Premeditation and Deliberation

Defendant contends the trial court erred in failing to grant his motion to dismiss because the State failed to present sufficient evidence of premeditation and deliberation. To submit a charge of first-degree murder to a jury, there must be substantial evidence that defendant killed the victim with malice and with premeditation and deliberation. *State v. Corn*,

303 N.C. 293, 296, 278 S.E.2d 221, 223 (1981) (citation omitted). Premeditation means that for some length of time before the act, the defendant thought it out. *State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (citation omitted). As long as it occurs at any point prior to killing, no specific amount of time is necessary for premeditation. *Id.*

"Deliberation means an intent to kill carried out 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" *Id.* The phrase "cool state of blood" does not involve an absence of emotion, but rather merely requires "that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." *Id.* (citation omitted). It is well-recognized by this Court that:

[p]remeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence. Among the circumstances to be considered in determining whether a killing was done with premeditation and deliberation is the conduct and statements of the defendant before and after the killing.

State v. Patel, 217 N.C. App. 50, 62, 719 S.E.2d 101, 109 (2011) (quoting *State v. Rose*, 335 N.C. 301, 318, 439 S.E.2d 518, 527

(1994), *overruled in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001)).

The State's evidence at trial showed that before Johnathan's death, defendant made statements that people with views like those of Johnathan should be killed. The evidence further showed that defendant had wondered aloud about what it would feel like to kill another human being, going so far as to tell others he would like to know how it felt to shoot someone in the head. Additional evidence presented at trial indicated that defendant had repeatedly tried to provoke Johnathan into fighting him, that defendant carried a concealed pistol in a holster beneath his clothes at all times, and that defendant used his concealed pistol to shoot Johnathan in the head. As such, this evidence was sufficient to survive defendant's motion to dismiss, since it could, and did, support a determination that defendant acted with premeditation and deliberation in connection with the shooting of Johnathan.

Self-defense Claim

Defendant further argues that the trial court erred in not granting defendant's motion to dismiss because the State did not present sufficient evidence to overcome defendant's claim of self-defense.

In a homicide prosecution, when the evidence raises the issue of self-defense, the State bears the burden of disproving it with substantial evidence. *State v. Gilreath*, 118 N.C. App. 200, 208, 454 S.E.2d 871, 876 (1995) (citation omitted). In the context of a motion to dismiss, the State must present "substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense." *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985) (citation omitted).

The first two elements required to prove self-defense are as follows:

(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.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992).

For the State to negate the defense of self-defense, the State must refute either of these two elements. *State v. Ammons*, 167 N.C. App. 721, 726, 606 S.E.2d 400, 404 (2005).

Defendant testified that, based on his relationship with Johnathan and the events leading up to his death, he reasonably believed it necessary to kill Johnathan to prevent Johnathan from killing him. However, defendant's contention that shooting Johnathan was reasonable under the circumstances was disputed by the State's evidence. The State presented testimony from multiple witnesses who testified that Johnathan was not carrying a knife on his person on the day he was killed and had not been observed making any threats towards defendant on that or any other day. Rather, the State's evidence showed a strong likelihood that defendant was the aggressor and that defendant's professed belief that he felt it necessary to kill Johnathan in order to save himself from death or great bodily harm was unreasonable. Defendant had made several attempts to fight Johnathan, and had made comments that a person with Johnathan's views deserved to be killed. Defendant, a part-time police officer, admitted to carrying a gun on his person at all times, including while he sat in his room playing video games, and admitted to keeping a stockpile of weapons and ammunition hidden in his dorm room. Moreover, despite being trained as a police officer to shoot "center-mass"¹ to stop an attacker, Johnathan

¹ "Center-mass" refers to the practice in which a police officer

was shot in the head. Moreover, based on the downward trajectory of the bullet through Johnathan's skull, the location of vomit on Johnathan's clothing, and the likelihood that Johnathan vomited out of fear immediately before his death, the evidence supported a finding that Johnathan was shot while kneeling. Finally, defendant admitted that Johnathan did not harm him in any way before defendant fired his gun. The totality of the evidence thus indicates that defendant's professed belief that he was in imminent danger of death or great bodily harm was not reasonable under the circumstances appearing in the record since there was sufficient evidence to negate defendant's assertion of self-defense. Therefore, the trial court did not err by denying defendant's motion to dismiss.

III.

Defendant contends the trial court erred in failing to intervene *ex mero motu* during the prosecutor's closing argument. We disagree.

When an improper closing argument does not provoke opposing counsel's timely objection, the proper standard of review is

whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.

shoots at the central torso of a person where the heart is located in the body.

[Such review demands a determination of] whether the argument in question strayed far enough from the parameters of propriety that the trial court . . . should have intervened on its own accord and (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). To constitute error, a party's comments must "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morston*, 336 N.C. 381, 405, 445 S.E.2d 1, 14 (1994) (citation omitted). In determining whether a party's closing argument prejudiced the defendant, it is essential to consider the argument relative to all the evidence presented to the jury. See generally *State v. Nance*, 157 N.C. App. 434, 444, 579 S.E.2d 456, 462 (2003).

It is well established that in arguments to the jury, counsel has wide latitude. *State v. Richardson*, 342 N.C. 772, 792, 467 S.E.2d 685, 697 (1996). In constructing a closing argument, counsel may "argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *Jones*, 355 N.C. at 128, 558 S.E.2d at 105 (2002) (citation omitted). This includes allowing a counsel to create "a scenario based on evidence already before the jury,

presenting a possibility of how events unfolded.” *State v. Parker*, 354 N.C. 268, 292, 553 S.E.2d 885, 901-02 (2001). While the range of acceptable conduct by counsel is great, it is not unlimited. See N.C. Gen. Stat. § 15A-1230(a) (2014) (declaring it improper for attorneys in a criminal trial to become abusive, interject personal experiences, express a personal belief as to the truth or falsity of evidence, or argue matters outside the record).

However, even assuming *arguendo* that the prosecutor’s remarks may have been improper, these remarks were not prejudicial. None of the prosecutor’s remarks so infected defendant’s trial as to produce an unfair verdict, particularly when viewed in the context of the entire trial. The evidence presented at trial, consisting of five days of testimony from twenty different witnesses, including defendant, overwhelmingly demonstrated that defendant shot and killed Johnathan with malice and premeditation and deliberation. Therefore, upon a close and careful review of the record, we conclude that it was highly unlikely that the jury would have reached a different verdict based on the evidence presented in this case, despite the prosecutor’s remarks. Accordingly, we overrule defendant’s argument.

IV.

Finally, defendant contends the trial court committed plain error in its jury instructions. We disagree.

The plain error standard of review applies when an appellant alleges errors in the jury instructions that were not preserved for appeal. See *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citation omitted). Plain error must be applied cautiously and is only found when there is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012). Prejudice occurs if, "after examination of the entire record, the error had a probable impact on the jury's finding that defendant was guilty." *Id.* at 518, 723 S.E.2d at 334 (citation and quotations omitted).

When examining jury instructions, we construe the instruction contextually and as a whole. *State v. Gaines*, 283 N.C. 33, 42-43, 194 S.E.2d 839, 846 (1973). Isolated portions of a charge, though incorrect, will not be held prejudicial when the whole charge is correct. *Id.*

Similar to *State v. Garner*, this case presents jury instructions dealing with the search for the truth. *State v.*

Garner, 330 N.C. 273, 295-96, 410 S.E.2d 861, 874 (1991). In *Garner*, the North Carolina Supreme Court upheld the use of a former pattern jury instruction in the trial court's final charge that stated that the "highest aim of every legal contest is the ascertainment of the truth." *Id.* at 296, 410 S.E.2d at 874. Our Supreme Court reasoned that this charge served merely to remind the jury to remain objective and impartial in its deliberations. *Id.*

Garner is applicable to the instant case, as here, the trial court's constant reminders for the jury to return from its breaks ready to "search for the truth" were mere reminders for the jury to remain objective and impartial. As such, the trial court did not commit plain error in reminding the jury of its duties during its deliberations.

Defendant further argues that the trial court committed plain error in incorrectly and inconsistently instructing the jury on second-degree murder.

When a trial court "charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part." *State v. Carelock*, 293 N.C. 577, 580, 238 S.E.2d 297, 299 (1977) (citation omitted) (granting a new trial where the trial court

instructed the jury that it could interpret the defendant's failure to testify as a denial of all allegations). Normally, a jury is not "expected to know which of two conflicting instructions is correct." *Id.* at 580, 238 S.E.2d at 299. However, when giving the correct instruction removes all harmful effect, or where the evidence does not allow the jury to misunderstand the charge, the erroneous instruction is deemed merely a harmless *lapsus linguae*. *State v. Cole*, 280 N.C. 398, 403, 185 S.E.2d 833, 836 (1972); *State v. Sanders*, 280 N.C. 81, 86, 185 S.E.2d 158, 162 (1971).

Here, the trial court's misstatement that second-degree murder "is the unlawful killing of a human being *without malice* . . ." was a merely a slip of the tongue, since the trial court later corrected itself by correctly stating that guilt of second-degree murder requires malice. Therefore, this instructional error concerning the offense of second-degree murder did not impact the jury's determination of defendant's guilt. Defendant's argument is, accordingly, overruled.

AFFIRMED.

Judges Elmore and Ervin concur.

Report per Rule 30(e).