

NO. COA14-504

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Caswell County
No. 08 CRS 50044

MAJOR WOODY MYERS, JR.

Appeal by Defendant from judgment entered 19 February 2009 by Judge Donald Stephens in Superior Court, Caswell County. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Linda B. Weisel for Defendant.

McGEE, Chief Judge.

Major Woody Myers, Jr. ("Defendant") was charged with the first-degree murder of his wife, Darlene Myers ("Ms. Myers"). During Defendant's trial, Defendant entered an *Alford* plea to second-degree murder, pursuant to a plea agreement. The plea agreement required that Defendant concede the existence of two aggravating factors in connection with Ms. Myers' homicide. The trial court accepted the plea agreement, found the existence of those aggravating factors, and sentenced Defendant for second-

degree murder in the aggravated range. On appeal, Defendant contends there was an insufficient factual basis to support the aggravating factors. We agree with Defendant. Thus, the plea agreement must be set aside, and we remand for disposition on Defendant's original charge of first-degree murder.

I. Background

Defendant and Ms. Myers lived together in rural Caswell County. Defendant regularly shot targets with firearms on their property. Defendant's neighbor, Danny Gregory ("Mr. Gregory"), disliked Defendant's target shooting and at times argued with Defendant over his practice of target shooting. Mr. Gregory's cousin, Tony Cook ("Mr. Cook"), was working on Mr. Gregory's property with other workers around 11:00 a.m. on 14 January 2008, when Mr. Cook heard gun shots coming from Defendant's property. Defendant was conducting target practice with his Taurus 9mm pistol ("the pistol"). Fearing that he or one of the other workers might be struck by a stray bullet, Mr. Cook confronted Defendant, and the two argued. Defendant eventually calmed down, apologized, went into his house, and Mr. Cook returned to his work.

Within the hour, at 11:37 a.m., Defendant called 911 and reported a shooting inside his home. Law enforcement and

emergency medical personnel arrived at Defendant's home around 11:50 a.m. and found Ms. Myers lying unresponsive and face down on the kitchen floor with a fatal gunshot wound in the back of her head. Other than an overturned space heater, the kitchen appeared undisturbed. In spite of multiple attempts at resuscitation, Ms. Myers was pronounced dead at 1:07 p.m., ninety minutes after the 911 call.

Defendant was not at home when law enforcement arrived. After calling 911, Defendant left his house and went to his stepdaughter's house to tell her what had happened. However, Defendant eventually returned and peacefully surrendered to law enforcement. Defendant subsequently was indicted for first-degree murder.

At trial, Defendant testified that he had consumed two 22-ounce beers and had smoked some marijuana on the morning of 14 January 2008, before engaging in target practice. Defendant further testified that, after his confrontation with Mr. Cook, he went inside his house and had a heated conversation with Ms. Myers over his ongoing disputes with Mr. Gregory. Defendant stated that he was frustrated, was talking with his hands, and that he continued to hold the pistol while he spoke. However, the pistol reportedly had a "hair-pin trigger," and Defendant

testified that it accidentally discharged and shot Ms. Myers in the head. The State contends the shooting was intentional.

Medical Examiner Deborah Radisch ("Dr. Radisch") testified that the cause of Ms. Myers' death was one "very tangential . . . almost a glancing" gunshot wound across the back of Ms. Myers' head. She testified that the gunshot was not made point-blank or in close range because there was no stippling about the wound. Dr. Radisch further testified that Ms. Myers likely lost consciousness shortly after being shot. She said that Ms. Myers had several bruises and abrasions on her face and hands, which "could be consistent with defens[ive] wounds." These injuries were visibly "faint" and not very large; although Dr. Radisch testified that, if Ms. Myers sustained the injuries right before being shot, her subsequent, and significant, blood loss would have minimized the amount of bruising that otherwise might have developed. Dr. Radisch further testified that these injuries were also consistent with injuries "inflicted by being struck by a blunt force object or perhaps a fall onto a hard surface," and "more likely than not" were incurred before the gunshot wound.

At the close of all the evidence, and pursuant to a plea agreement ("the plea agreement"), Defendant entered an *Alford* plea to second-degree murder. The plea agreement provided that

[u]pon Defendant's plea to second-degree murder with the existence of aggravating factors ([taking] advantage of [a] position of trust and confidence, and [especially heinous], cruel, and atrocious); Defendant waives notice of aggravating factors; and sentencing will be in the aggravated range.

The trial court conducted a plea colloquy with Defendant, found factual bases for the above-listed aggravating factors, and accepted Defendant's plea. The trial court sentenced Defendant in the aggravated range for second-degree murder. Defendant did not enter a notice of appeal. However, Defendant filed a petition for a writ of certiorari with this Court on 7 October 2013 to review his sentence, which this Court granted.

II. Standard of review

The standard of review for a sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and at the sentencing hearing. See *State v. Choppy*, 141 N.C. App. 32, 43, 539 S.E.2d 44, 51 (2000).

III. Analysis

On appeal, Defendant contends there was not a sufficient factual basis for the trial court to find the aggravating factors listed in Defendant's plea agreement. Defendant is correct.

A. *Especially Atrocious, Heinous, or Cruel*

During Defendant's sentencing hearing, the trial court found that

[Ms. Myers] suffered blunt force trauma to her face in the nature of an assault separate and apart from the final assault that caused her death, and the totality of the assault that she suffered . . . in combination [was] especially atrocious, heinous, and cruel and therefore, the Court makes that finding in aggravation.

There is not a sufficient factual basis in the record to support this finding.

All homicides are gruesome. However, to support a finding that a homicide was especially heinous, atrocious, or cruel, the defendant's acts must have been characterized by "excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*" in the homicide charged. *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983).

In *State v. Martin*, 303 N.C. 246, 250-53, 278 S.E.2d 214, 217-19 (1981), the trial court properly found a homicide was especially heinous, atrocious, or cruel where the victim was paralyzed from the waist down after being shot by the defendant. The defendant then, over a twenty-five minute period, dragged the victim into another room, beat her with a pistol, threw her repeatedly against a wall, beat her on the head with his fists,

and beat her again with the pistol before finally firing the fatal shots. *Id.* at 252, 278 S.E.2d at 218. Similarly, in *State v. Shadrick*, 99 N.C. App. 354, 355, 393 S.E.2d 133, 133 (1990), the trial court properly found this aggravating factor where,

on the day of the offense and prior to the victim's death, [the] defendant assaulted the victim, his wife, by pushing her and pulling her by the hair of her head, [the] defendant placed a gun to the victim's head and clicked the trigger, and [the] defendant burned the victim's clothes in her presence and burned her pubic hair.

Assuming *arguendo* that Defendant did cause the additional injuries found on Ms. Myers' hands and face before she was shot, although deplorable, those injuries alone do not rise to the level of extreme physical and psychological suffering that would support a finding that the circumstances surrounding Ms. Myers' death were especially atrocious, heinous, or cruel.

The State also argues that a finding of this aggravating factor is supported by the fact that Ms. Myers was killed within the "sanctuary" of her home. In support of this contention, the State cites several sources of authority, specifically *State v. Garcell*, 363 N.C. 10, 66, 678 S.E.2d 618, 653 (2009); *State v. Cummings*, 361 N.C. 438, 477, 648 S.E.2d 788, 811-12 (2007); and *State v. Smith*, 359 N.C. 199, 220, 607 S.E.2d 607, 622 (2005).

While it is true that killing someone in his or her home can help support a finding that a homicide was especially heinous, atrocious, or cruel, the present case is distinguishable from the authority presented by the State. The defendants in *Garcell*, *Cummings*, and *Smith* did not live with their victims, and they either had no lawful right to be in the victims' homes when the homicides occurred or had tricked their way inside. See *Garcell*, 363 N.C. at 21, 678 S.E.2d at 626; *Cummings*, 361 N.C. at 443, 648 S.E.2d at 792; *Smith*, 359 N.C. at 203, 607 S.E.2d at 612. In the present case, Defendant was in the home that he lawfully shared with Ms. Myers when she was shot. As such, Defendant's mere presence in his own home did not make his actions especially atrocious, heinous, or cruel.

Finally, the State contends that a finding of this aggravating factor is supported by the fact that Ms. Myers did not die instantaneously; indeed, from the time Defendant called 911, it took Ms. Myers ninety minutes to die. In support of its contention, the State points only to *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984). However, in *Stanley*, this aggravating factor was found unsupported by the evidence where the victim was shot, "rendered . . . unconscious within minutes," and died some time later. *Id.* at 340, 312 S.E.2d at

398. The *Stanley* Court expressly stated that even where "death is not instantaneous, . . . [this] does not alone make a murder especially heinous, atrocious or cruel." *Id.* at 337, 312 S.E.2d at 396.

In the present case, Dr. Radisch's testimony indicated that Ms. Myers likely lost consciousness shortly after being shot and, although she was not pronounced dead for at least another ninety minutes, there was no indication she suffered during that time period. As such, the present case is not distinguishable from *Stanley*, and the State's argument here is without merit. Therefore, for all the above reasons, the trial court's finding that the circumstances surrounding Ms. Myers' death were especially heinous, atrocious, or cruel was not supported by the evidence.

B. Position of Trust or Confidence

During Defendant's sentencing hearing, the trial court also found that

given the relationship between the Defendant and the victim, his wife, that the Defendant did take advantage of a position of trust, including a domestic relationship[,] to commit this offense, and therefore finds aggravating factor number 15 based upon the evidence presented to the jury and to this Court with regard to what occurred on January the 14th of 2008, at the time, prior to the victim's death.

This, too, is not supported by the evidence.

In essence, the State presents this Court with the argument that the marital nature of Defendant's and Ms. Myers' relationship made his killing her a *per se* taking advantage of a position of trust or confidence. Indeed, the State's argument that the trial court's finding was supported by the evidence rests on a contention that Defendant and Ms. Myers had been married for eighteen years, they shared a home together, and that Ms. Myers was shot while not directly facing Defendant because "she had no reason to distrust [Defendant] immediately before he fired the gun." However, "[t]he relationship of husband and wife does not *per se* support a finding of trust or confidence where '[t]here was no evidence showing that defendant exploited his wife's trust in order to kill her.'" *State v. Wiggins*, 159 N.C. App. 252, 269, 584 S.E.2d 303, 316 (2003) (quoting *State v. Marecek*, 152 N.C. App. 479, 514, 568 S.E.2d 237, 259 (2002)) (emphasis added). In other words, in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence with his or her spouse in some way to effectuate the offense. See e.g., *State v. Arnold*, 329 N.C. 128, 135, 144, 404 S.E.2d 822, 826, 832 (1991) (aggravating factor supported by the

evidence where the defendant asked her husband to retrieve her purse from their church late at night, and where, upon arrival, the husband was ambushed by the wife's lover and killed). In the present case, there is no evidence that Defendant asked Ms. Myers to face away from him before firing the pistol, or that he otherwise utilized his position of trust or confidence with Ms. Myers in order to effectuate her death. As such, the trial court's finding that Defendant took advantage of a position of trust or confidence in order to kill Ms. Myers also was not supported by the evidence.

C. Rescinding the Plea Agreement

Because neither of these aggravating factors has a sufficient factual basis in the record, this Court now must determine the proper disposition for Defendant's appeal. In *State v. Rico*, 218 N.C. App. 109, 110, 720 S.E.2d 801, 802 (2012), *rev'd in part per curiam for the reasons stated in the dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012), the defendant was charged with first-degree murder. The defendant entered into a plea agreement, through which he pleaded guilty to voluntary manslaughter and admitted to the existence of an aggravating factor in connection with the homicide. *Id.* at 110-11, 720 S.E.2d at 802. The trial court accepted the plea agreement and

found the existence of the aggravating factor that was included in the plea agreement. *Id.* at 111, 720 S.E.2d at 802. After being sentenced in the aggravated range for voluntary manslaughter, the defendant appealed and successfully challenged the factual sufficiency of that aggravating factor. *Id.* at 118, 720 S.E.2d at 806. However, because the defendant "elected to repudiate a portion of his [plea] agreement," the "essential and fundamental terms of the plea agreement were unfulfillable." *Id.* at 122, 720 S.E.2d at 809 (Steelman, J, dissenting in part). As a result, the plea agreement had to be set aside, and the case was remanded to superior court for disposition on the original charge of first-degree murder. *Rico*, 366 N.C. at 327, 734 S.E.2d at 571; accord *State v. Smith*, __ N.C. App. __, __ S.E.2d __, COA13-742-2, slip op. at 9-10 (Aug. 5, 2014) (unpublished) (setting aside the defendant's plea agreement, which defendant repudiated, and remanding for disposition on the original charges against the defendant).

Defendant's case is indistinguishable from *Rico*. Defendant entered into a plea agreement, through which he pleaded guilty to a lesser included offense of first-degree murder and admitted to two aggravating factors in connection with Ms. Myers' homicide. On appeal, Defendant successfully challenges the

factual bases for the aggravating factors set out in his plea agreement. Therefore, as required by *Rico*, Defendant's plea agreement must be set aside and this case is remanded for disposition on the original charge of first-degree murder.

Reversed and remanded; new trial.

Judges GEER and STROUD concur.