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NO. COA14-727
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Cleveland County
No. 12 CRS 50635

WILLIAM EARL HUFFSTETLER

Appeal by defendant from judgment entered 20 February 2014 by Judge Timothy S. Kincaid in Cleveland County Superior Court. Heard in the Court of Appeals 3 November 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

HUNTER, Robert C., Judge.

William Earl Huffstetler ("defendant") appeals from judgment entered after a jury convicted him of first degree murder. Defendant argues on appeal that: (1) the trial court committed plain error by instructing the jury that it could convict defendant without finding that he had the requisite specific intent to commit first degree murder, and (2) the trial

court erred by denying defendant's motion to dismiss for pre-indictment delay where there was a sixteen-year gap between the victim's death and defendant's arrest.

After careful review, we find no error.

Background

The following evidence was presented at trial: On 20 June 1995, Gator Martin ("Martin") returned home to Blacksburg, North Carolina after spending the week working in Columbia, South Carolina. Martin wanted to find defendant and "party" with him. After looking for defendant at several locations, Martin went to his friend Gene Glover's ("Glover's") house to drink. Defendant eventually arrived at Glover's home, changed clothes, and left with Martin in Martin's car. The two drove to a liquor store and a convenience store to buy alcohol.

From there, defendant and Martin went to Ricky Carroll's ("Carroll's") house to buy marijuana and four hits of acid. After taking the drugs, they picked up Glover, bought crack cocaine, and drove around smoking and drinking. After picking up Randy "Tripp" Wagenknecht ("Wagenknecht"), Martin drove the group to the Log Cabin, an illegal bar run by Charleen Simons ("Simons") in Kings Mountain, North Carolina. The group arrived at the bar sometime after midnight.

Martin testified at trial that while the group was at the Log Cabin, defendant continuously played the song "Seven Spanish Angels" on the jukebox. At around 12:45 a.m. Simons's friend, Bobbie, called the bar and spoke with Simons. She testified that she also heard "Seven Spanish Angels" playing in the background. According to Martin's testimony, after being in the Log Cabin between 20 and 30 minutes, defendant and Glover conspired to rob the bar. When Martin overheard what defendant and Glover were planning, he attempted to leave. However, Glover told Martin that he wasn't going to leave or he would get a "dose of what she was going to get."

According to Martin, defendant called Simons over and told her to give him the money in the register. When she refused, defendant hit Simons in the head with a pool stick, snapping the stick in half and causing Simons to drop to her knees. Martin testified that defendant and Wagenknecht then picked up Simons and took her behind the bar, where defendant used a knife to stab her several times in the chest. After defendant stabbed her, Glover cut her throat.

Dr. Cheryl Leone performed Simons's autopsy and testified as a witness for the State. She testified that Simons bled to death, most likely from her neck wound. She also testified that

Simons had six stab wounds to her chest, back, and head, with the stab wounds in the chest resulting in damage to the left ventricle of Simons's heart. The knife also penetrated the left lung and thoracic aorta, causing internal bleeding.

Defendant was indicted for first degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon on 13 February 2012, almost seventeen years after the commission of the crime.

Prior to trial, defendant filed a motion to dismiss based, in part, on the pre-indictment delay. At the hearing on defendant's motion, the State presented evidence that the investigator on the case, Don Allen of the State Bureau of Investigation, retired in 2000 due to medical issues. Two detectives were then hired in 2010 as cold case investigators in Simons's murder. After gathering new evidence and re-interviewing witnesses, the State felt that it had a strong enough case to bring charges against defendant. After hearing argument from both parties, the trial court denied defendant's motion.

Defendant chose not to testify or put forth any evidence. The jury found defendant guilty of first degree murder and not guilty of robbery with a dangerous weapon. Defendant was

sentenced to life imprisonment without parole and entered timely notice of appeal.

Discussion

I. Jury Instruction

Defendant's first argument on appeal is that the trial court erred by instructing the jury in a manner that allowed it to find defendant guilty of first degree murder without possessing the required specific intent. We disagree.

Defendant did not challenge the jury instruction at trial. Therefore, this Court reviews the trial court's instruction for plain error. N.C.R. App. P. 10(a)(4) (2013); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 879 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 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) (citation and quotation marks omitted). "[T]he trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *State v. Boykin*, 310 N.C. 118,

125, 310 S.E.2d 315, 319 (1984). The burden of demonstrating plain error lies with defendant. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

First, we agree with the State and defendant that *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), applies to the jury instructions in this case. Although *Blankenship* was overruled by the Supreme Court in *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), the Court "explicitly stated that there would be no retroactive application of the overruling of *Blankenship*." See also *State v. Bonnett*, 348 N.C. 417, 439, 502 S.E.2d 563, 578 (1998) ("Since the crime and judgment in this case occurred subsequent to our decision in *Blankenship* and prior to our decision in *Barnes*, the rule as stated in *Blankenship* applies to defendant's case."). As the footnote to the North Carolina Pattern Jury Instructions for acting in concert explains, *Blankenship* applies for all specific intent crimes committed on or after 24 September 1994 (the date that *Blankenship* was issued by the Court) and before 3 March 1997 (the date that the Supreme Court overturned *Blankenship*). See N.C.P.I. Crim. 202.10, n. 4. Therefore, because Simons was killed on 21 June 1995, we will apply the rule in *Blankenship* to the jury instructions here.

In *Blankenship*, the trial court instructed the jury as follows:

Now, I charge for you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State of North Carolina must prove five things beyond a reasonable doubt . . . First, that the defendant, or someone acting in concert with him, intentionally and with malice, killed [the victims] . . . Third, that the defendant or someone acting in concert with him, intended to kill [the victims].

Id. at 555-56, 447 S.E.2d 734-35. The Court determined that these instructions were likely to be understood by the jury to permit them to convict defendant under a specific intent crime if only one of the conspirators actually formed the specific intent. In finding these instructions erroneous, the *Blankenship* Court held that "one may not be criminally responsible under the theory of acting-in-concert for a crime like premeditated and deliberated murder, which requires specific intent, unless he is shown to have the requisite specific intent." *Id.* at 558, 447 S.E.2d at 736.

Defendant argues that the trial judge's instruction here mirrors the instruction given by the trial court in *Blankenship* and is similarly erroneous for the same reason. We disagree. The trial court in *Blankenship* instructed the jury that it could

convict the defendant for deliberate and premeditated murder if "the defendant, or someone acting in concert with him," intentionally killed the victims. *Id.* at 556, 447 S.E.2d at 735 (emphasis added). In contrast, the trial court here instructed the jury as follows:

For you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things beyond a reasonable doubt:

First, that the defendant *acting alone or together with others intentionally* and with malice killed Simons with a deadly weapon. . . . If the State proves beyond a reasonable doubt that *the defendant intentionally killed Simons with a deadly weapon or intentionally inflicted a wound upon her with a deadly weapon that proximately caused her death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled or required to do so. . . .*

Second, the State must prove beyond a reasonable doubt that *the defendant's acts* were a proximate cause of the death. . .

Third, that *the defendant acting alone or together with others intended to kill Simons. . . .*

Fourth, that the defendant acted after premeditation. That is, *the intent to kill was formed over some period of time, however short, before the act.*

And fifth, that the defendant acted with deliberation, which means he was in a cool

state of mind.

(Emphasis added).

Unlike in *Blankenship*, the trial court did not instruct the jury that it could convict defendant of murder if one of his cohorts had the required specific intent. Rather, the trial court clearly instructed the jury it must find that defendant, acting alone or in concert, had the specific intent to kill the victim. In other words, it was defendant's mental state that was at issue, regardless of whether he acted alone or in concert with others. Although the trial court did not use the verbatim instruction that "one may not be criminally responsible on the basis of acting in concert . . . unless he is shown to have the requisite specific intent," N.C.P.I. Crim. 202.10, n. 4, it phrased its instruction in such a way that the substance of the instruction did not run afoul of *Blankenship*. See *State v. Spencer*, 192 N.C. App. 143, 151, 664 S.E.2d 601, 606 (2008) ("Word for word conformity of the jury instructions to the pattern instructions is not required; substantial conformity is all that is required.").

Even assuming this jury instruction was given in error, it does not rise to the level of plain error. To meet the level of plain error, defendant must show that error had a "probable

impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. The State presented eyewitness testimony that defendant hit Simons in the back of her head with a pool stick and stabbed her repeatedly in the chest, causing severe damage to her heart and internal bleeding. This evidence, if believed by a jury, would support a finding of specific intent to kill on the part of defendant. See *State v. Pointer*, 181 N.C. App. 93, 97, 638 S.E.2d 909, 912 (2007) (holding that evidence of a defendant's repeated stabbing of the victims and infliction of serious injuries could support a reasonable inference that the defendant intended to kill the victims). Given this evidence, defendant has failed to carry the high burden of showing plain error in the trial court's instruction.

II. Pre-indictment Delay

Defendant's second argument on appeal is that the trial court erred in denying his motion to dismiss for pre-indictment delay. We find no error.

In *United States v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752 (1977), the United States Supreme Court clarified the law regarding pre-indictment delay. The Court held that the basis of a defendant's claim is the Due Process Clause of the Fifth

and Fourteenth Amendments, not the Speedy Trial Clause of the Sixth Amendment, because the latter is only applicable after a person has been formally accused of a crime. *Id.* at 790, 52 L. Ed. 2d at 759. Further, in considering whether a delay has caused a due process violation, the Court "must balance the defendant's prejudice against the government's justification for delay." *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). Because this issue implicates constitutional rights, we review the trial court's decision to deny defendant's motion to dismiss *de novo*. *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674-75 (2000).

After the *Lovasco* decision, our Supreme Court examined pre-indictment delay in North Carolina and established that a defendant must carry two burdens in order to succeed on his claim. First, the defendant must show that the pre-indictment delay resulted in "actual and substantial" prejudice. See *State v. Davis*, 46 N.C. App. 778, 782, 266 S.E.2d 20, 23 (1980). Second, the defendant has the burden of demonstrating that "the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant." *Id.* "Essentially a pre-accusation delay violates due process only if the defendant can

show that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant." *State v. McCoy*, 303 N.C. 1, 7-8, 277 S.E.2d 515, 522 (1981); see also *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23 ("[T]o prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.")

Here, defendant first claims that he was prejudiced by the delay because several individuals who defendant claims would have been potential defense witnesses, including Glover, were deceased by the time his case came on for trial. In order to establish "substantial and actual" prejudice, *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23, "[t]he defendant must show that the resulting lost evidence or testimony was significant and would have been beneficial to his defense," *State v. Marlow*, 310 N.C. 507, 521-22, 313 S.E.2d 532, 541 (1984). Defendant has failed to meet that burden here. Although he claims the testimony from these individuals would contradict the State's timeline of events, much of the purported testimony would conflict with itself and further implicate defendant. For

example, defendant claims that had Glover lived, he would have testified that he was not with defendant at the Log Cabin on the night in question, contradicting the State's evidence that defendant and Glover attacked Simons together. The State rebutted this argument by noting that Glover later told law enforcement: "[L]et me tell you what [defendant's] told me since then. He told me that he killed that woman at the Log Cabin and got away with it." Additionally, defendant also claims that Virginia Wheeler would have testified that Glover was with defendant and Martin on the night of Simons's death, but the group brought Glover back to his home at 10:30 p.m. This testimony would conflict with the State's timeline of events, but would also contradict Glover's purported testimony that he was not with defendant on the night in question. Although the individuals defendant identified may have provided testimony tending to contradict the State's timeline, the fact that they would have also contradicted themselves and, in the case of Glover, specifically implicated defendant in the murder, leads us to conclude that the lost testimony was not "significant" and did not cause "actual and substantial" prejudice to defendant.

Even assuming *arguendo* that defendant has shown actual and substantial prejudice as a result of the delay, he has failed to

carry the additional burden of demonstrating that the delay was intended to impair his defense or to gain a tactical advantage. See *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23. At the hearing on the motion to dismiss, the State informed the trial court that the original investigator on the case retired in 2000 due to medical issues. After the original investigator retired, the case "went cold" until new investigators were hired in 2010. The newly hired investigators reviewed the evidence and conducted new interviews which produced substantial evidence implicating defendant in the murder.

First, the investigators interviewed April Wagenknecht ("April"), Wagenknecht's ex-wife. April told the investigators that she overheard defendant discussing his part in the murder. Specifically, April testified that she overheard defendant telling two other men in her home that defendant had killed a woman at the Log Cabin. Second, Rhonda Wood ("Wood"), defendant's ex-girlfriend, told the investigators that defendant gave her a detailed and grisly description of the murder. At trial, Wood testified that defendant told her that "there was a place up in the mountains at this log cabin that he cut this woman's head off and crapped down her throat."

Defendant failed to present any evidence demonstrating an intention on behalf of the State to delay the proceedings in order to impair defendant's ability to present a defense. His counsel explicitly stated at the hearing that "I don't have any evidence and I don't think the State has intentionally delayed charging anybody or prosecuting anybody to trample their rights. I don't think it was intentional." The law is clear that a defendant's due process rights are violated through pre-indictment delay only where "the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant." *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23. Accordingly, because defendant has failed to show actual and substantial prejudice and has also failed to demonstrate that the delay was intended to impair his ability to present a defense, we find no error in the trial court's denial of defendant's motion to dismiss.

Conclusion

After careful review, we hold that the jury instructions given by the trial court did not violate the rule in *Blankenship*, and defendant's due process rights were not violated by pre-indictment delay. Thus, we find no error.

NO ERROR.

Chief Judge MCGEE and Judge BELL concur.

Report per Rule 30(e).