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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1265

Filed: 17 November 2015

Bladen County, No. 12CRS51850

STATE OF NORTH CAROLINA

v.

JESSIE EARL SIMPSON, Defendant.

Appeal by defendant from judgment entered on or about 24 April 2014 by Judge Robert F. Floyd, Jr. in Superior Court, Bladen County. Heard in the Court of Appeals 21 May 2015.

Attorney General Roy A. Cooper, III, but Special Deputy Attorney General Olga Vysotskaya and Amar Majmundar, for the State.

Appellate Defendant Staple Hughes, by Assistant Appellate Defendant Daniel Shatz, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgment convicting him of first degree murder. For the following reasons, we conclude that the trial court committed no error.

I. Background

On or about 4 September 2012, defendant was indicted for first degree murder based upon “malice aforethought[.]” Defendant’s trial by jury began on 21 April 2014. The State’s evidence tended to show that defendant ran a “numbers” game, a type of illegal lottery, out of his house. On 13 August 2012, defendant’s now-adult daughter, Amanda,¹ along with her friend, Kimberly, were in Amanda’s room. Charles Allen, who had known defendant for about 20 years and who assisted defendant in his numbers game by delivering packages, visited defendant’s house and sat down at the kitchen table. Shortly thereafter, Charles Stephens arrived at defendant’s home to collect money from the numbers game. Defendant, Mr. Allen, and Mr. Stephens were all in the kitchen, and defendant and Mr. Stephens began to argue over the amount of money defendant owed to Mr. Stephens. Mr. Allen had fallen asleep at the kitchen table, and money was on the kitchen table. As the argument became more heated, the State’s evidence tended to show that defendant left the kitchen, and after he returned Amanda heard a gun being

¹ Pseudonyms are used.

chambered and then a gunshot. The gunshot awakened Mr. Allen, and he immediately left the house. Mr. Stephens died as a result of a gunshot wound.

The State's evidence showed that various law enforcement and EMS personnel went to defendant's home upon receiving the 911 call reporting that the shooting had occurred. Agent Royal arrived at approximately 9:40 pm and took photographs of the crime scene. The crime scene log showed that other people had been in the house after the shooting and prior to Agent Royal's arrival. Agent Royal admitted that he did not know what might have taken place before he got there, and he included a warning in his report that "contamination of the crime scene prior to [his] arrival was unknown[.]" Agent Royal photographed some envelopes and money on top of the dresser in Amanda's bedroom. The State admitted the photographs of Amanda's dresser and the actual money and envelopes. Agent Royal testified about his inventory of the crime scene during the State's case in chief without objection from defendant.

At trial, defendant elected to testify in his own defense. Defendant did not dispute that he shot Mr. Stephens, but he claimed that the shooting was accidental. Defendant said that before the shooting, he and Mr. Stephens were arguing about the money he owed to Mr. Stephens from the numbers game and that the money was on the kitchen table. The State then cross-examined defendant on this issue as follows:

Q: Y'all argued about some money?

A: Yes.

Q: And you said the money's on the table?

A: Yes, sir.

Q: Of course, when law enforcement got there the money was not on the table?

A: I don't know where it was at that time.

Q: But it's your testimony you never took it and put it on your daughter's –

A: No, sir –

Q: -- dresser?

A: No, sir.

Q: All right. Of course, you heard both of

them testify that they had been in a room braiding hair for a day and a half and had never seen money on the counter (sic)?

A: Yes, sir.

Q: Of course, Mr. Stephens couldn't take it back there. He couldn't have taken the money back there after he was shot?

A: No, sir.

Q: And Mr. Allen got up and ran right out of the house after it happened?

A: Yes, sir.

Q: And you say your daughter and . . . [Kimberly] didn't take it back there?

A. No, sir.

Q: Well, who else was in the house that could have taken it back there?

A: I don't know, I was assisting Charles.

Q: I know, but I'm asking you, who else was in the house that could have taken it back there?

A: No one. No one.

Q: Can't you just tell us the truth about

that, sir?

Mr. Hicks: Objection and
move to strike.

The Court: All right sustained. Motion
to strike is granted. Do not consider the
question or the response as evidence.

Q: Didn't you take the money back there?

A: No, sir.

Q: It was on the table when Mr. Stephens
got shot, and it was on your daughter's dresser
back there when law enforcement processed the
scene. How did it get back there?

A: I have no idea how it got back there.

The State's closing argument is not included in the transcript, but
the record includes a narrative reconstruction of the argument, as
permitted by North Carolina Rule of Appellate Procedure 9(c)(1), which
describes the closing as follows:

[during] the State's closing argument, the
State argued that . . . [defendant's] testimony that
he did not move the money and envelopes depicted
in [S]tate's exhibits 6 and 7 from the kitchen to his
daughter's bedroom, and that because Mr.
Simpson's testimony on this point was not
credible, the jury should not consider the

remainder of his testimony to be credible. Defense counsel objected to this argument and defense counsel's objection was overruled.

The jury found defendant guilty. The trial court sentenced him to life imprisonment without parole. Defendant appeals.

II. Evidence of Envelopes and Money on Dresser

As noted above, defendant's defense was based upon his contention that the shooting was accidental. Defendant's brief explains:

There was no question in this case that . . . [defendant] shot Mr. Stephens and that Mr. Stephens died as a result of being shot. The entire trial turned on the credibility of . . . [defendant]'s claim that he accidentally shot Mr. Stephen's, weighed against whatever inference the jury chose to draw from the State's evidence that the shooting was not accidental.

Defendant's arguments are all in the context of his defense of accident and all address the evidence of the envelopes and money on Amanda's dresser. Defendant's first argument is that

the trial court committed plain error by admitting evidence of money found on the dresser of [Amanda]'s bedroom, and by allowing the prosecutor to ask questions that assumed a fact not in evidence – that the money was on the dresser when law enforcement first arrived,

thereby allowing the prosecutor to unfairly attack . . . [defendant]’s credibility.

(Original in all caps.)

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error. However:

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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Godbey, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2015)

(citations, quotation marks, and brackets omitted). Thus, we first consider whether “a fundamental error” occurred at trial. *Id.*

Defendant contends that the State “introduced evidence of the money and envelopes on [Amanda’s] dresser, despite the absence of any foundation that the money and envelopes were there when law enforcement first arrived on the scene.” Defendant then cites to law regarding relevance. Defendant contends that without first establishing exactly who placed the envelopes and money on Amanda’s dresser, and when they did so, the evidence was irrelevant. Essentially, defendant argues that the envelopes and money are relevant only if he personally moved them from the kitchen to the bedroom; since defendant claims that he did not move the envelopes and money, someone else must have, and thus they are irrelevant.

“‘Relevant evidence’ means evidence having 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 that evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2013). “Evidence which is not relevant is not admissible.” N.C. Gen. Stat. § 8C-1, Rule 402 (2013). The envelopes and money were relevant because even if the evidence does not establish *exactly* when they were placed in the bedroom, they still

have the “tendency to make the existence of” several facts which are important in the “determination of the action more probable or less probable[.]” N.C. Gen. Stat. § 8C-1, Rule 401.

Before the evidence of the envelopes and money was used on cross-examination to attack defendant’s credibility, the State used it as part of its evidence regarding defendant’s numbers game, why Mr. Stephens had come to defendant’s home, and how the argument began between defendant and Mr. Stephens which ultimately led to Mr. Stephens’ death. And indeed, the envelopes and money are relevant to demonstrate these facts. *See id.* The evidence was relevant when the State introduced it, and it did not lose its relevancy because defendant ultimately elected to testify and contradict the State’s version of the facts.

Defendant’s main argument as to the relevance of the envelopes and money seems to be based less on the State’s initial use of the evidence and more on the manner in which the State used it to attack his credibility. But defendant’s argument overlooks the fact that although there is not direct evidence of who put the money in the bedroom, there is circumstantial evidence from which the jury could infer that he moved

it there. Premeditation and deliberation are often proved by circumstantial evidence, and circumstantial evidence is considered under the same rules as direct evidence:

Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence. Premeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence.

Circumstantial evidence is often made up of independent circumstances that point in the same direction. These independent circumstances are like

strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the defendant beyond reasonable doubt. Every individual circumstance must in itself at least tend to prove the defendant's guilt before it can be admitted as evidence. No possible accumulation of irrelevant facts could ever satisfy the minds of the jurors beyond a reasonable doubt.

When proving premeditation and deliberation, the strands in the rope of circumstantial evidence may include: . . . defendant's conduct and statements before and after the killing, including attempts to cover up involvement in the crime[.]

State v. Parker, 354 N.C. 268, 279-80, 553 S.E.2d 885, 894 (2001) (citations, quotation marks, ellipses, and brackets omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

The evidence of defendant's intent to kill was entirely circumstantial, and the evidence of the location of the envelopes and money was just one piece of the circumstantial evidence. The State focused on evidence indicating that the envelopes and money found on Amanda's dresser had been on the kitchen table, had been the cause of discord, and had not been moved by anyone else in the house, so defendant must have moved it. Defendant countered this argument by noting that EMS and other law enforcement had been in the house and may have moved the envelopes and money. It was up to the jury to weigh all of the evidence, including the circumstantial evidence, *see id.*, and determine what crime the evidence showed defendant had committed. The jury had the option of convicting defendant of first degree murder, second degree murder, involuntary manslaughter or of finding defendant not guilty. The evidence of the envelopes and money was relevant and to

be weighed as the jury saw fit in determining defendant's ultimate culpability in the crime.

Defendant also contends that the trial court committed error because it allowed "two of the prosecutor's questions [which] directly assumed the critical fact, not in evidence, that the envelopes and money were already on the dresser when law enforcement arrived, and the entire line of questioning is implicitly based on this assertion." According to defendant, the two questions at issue are: (1) "Of course, when law enforcement got there the money was not on the table?" and (2) "[the] money was on the table when Mr. Stephens got shot, and it was on your daughter's dresser back there when law enforcement processed the scene. How did it get there?" Again, defendant argues plain error.

For the same reasons as noted above, the State's questions did not assume facts not in evidence, but instead were questions on cross-examination relying on the circumstantial evidence of the reason for the location of the envelopes and money, *i.e.*, that no one else in the house could have possibly moved it except for the EMS personnel or law enforcement, and they would have no reason to do so. Defendant was

free to disagree with the State's assessment of the circumstantial evidence and did so. The fact that the State views the possible inferences from the evidence of the envelopes and money differently than defendant does not mean the State relied on facts not in evidence; it simply means the evidence is susceptible to multiple interpretations.

Lastly, defendant argues that "the trial court erred by overruling the defense objection to the prosecutor's closing argument that because . . . [defendant]'s denial that he moved the money was not credible, the jury should also find the rest of his testimony lacking in credibility." According to our record, there was no motion for complete recodation pursuant to North Carolina General Statute § 15A-1241, and therefore a description of the State's closing argument was added to the record pursuant to North Carolina Rule of Appellate Procedure 9(c)(1):

During the State's closing argument, the State argued that . . . [defendant]'s testimony that he did not move the money and envelopes depicted in state's exhibits 6 and 7 from the kitchen to his daughter's bedroom, and that because . . . [defendant]'s testimony on this point was not credible, the jury should not consider the remainder of his testimony to be credible. Defense counsel objected to this argument and defense

counsel's objection was overruled.²

We review the State's closing argument for an abuse of discretion. *See State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). "When applying the abuse of discretion standard to closing arguments, . . . [we] first determine[] if the remarks were improper. . . . [i]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence[.]" *Id.* at 131, 558 S.E.2d at 106.

Once again, for the same reasons as already noted above, the State's closing argument was not improper. The argument accurately reflected the evidence presented by the State and pointed out reasonable inferences which the jury might draw from that evidence. As we have already determined that the evidence regarding the money and envelopes was relevant and that the State could use cross-examination of defendant to attack his credibility, the State may properly make arguments

² We are hesitant to review an argument regarding specific statements made in closing without a transcript of the actual statements, but we choose to review this issue to the extent that we can based on the record.

regarding this evidence in closing arguments. *See State v. Gladden*, 315 N.C. 398, 422, 340 S.E.2d 673, 688 (“Counsel for both sides may argue the law and the facts in evidence, along with all reasonable inferences to be drawn from them. Counsel may not, however, raise incompetent and prejudicial matters nor refer to facts not in evidence. Counsel is also prohibited from placing before the jury his own knowledge, beliefs, and personal opinions not supported by the evidence.”) (citations omitted), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Thus, in summary, we conclude that the evidence regarding the envelopes and the money was relevant; the State properly used its own inferences from the evidence to question defendant’s version of the facts on cross-examination; and thereafter, the State properly summarized the evidence and possible inferences from the evidence in its arguments to the jury.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges McCULLOUGH and INMAN concur.

STATE V. SIMPSON

Opinion of the Court

Report per Rule 30(e).