IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1093

Filed: 20 September 2016

Wayne County, No. 11 CRS 053949

STATE OF NORTH CAROLINA

v.

GARY ARTHUR METZGER

Appeal by defendant from judgment entered 17 October 2014 by Judge Arnold O. Jones in Wayne County Superior Court. Heard in the Court of Appeals 9 March 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

CALABRIA, Judge.

Gary Arthur Metzger ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first-degree murder. We find no error.

I. Background

Jean Metzger Hubbard ("Hubbard") and defendant were adoptive siblings. Hubbard was reported missing on 2 August 2011 by co-workers who were concerned about her after she had missed work and had not been seen since Friday, 29 July 2011. Investigator Duane Bevell ("Bevell") with the Goldsboro Police Department

("GPD") received Hubbard's case that same day. Bevell located defendant and Ann Metzger ("Ann"), defendant's wife (collectively, "the Metzgers"), who told him that they had last seen Hubbard on 30 July 2011 when she brought her car over for defendant to repair. Ann also said that when she drove Hubbard home around five o'clock that evening, defendant went to Auto Zone to buy a battery for Hubbard's car and left it in the Wal-Mart parking lot for her to pick up. When Bevell found the car where defendant had described and located the Auto Zone, he discovered that defendant had purchased the battery under a false name. Defendant had also mentioned a particular house Hubbard frequented, which turned out to be a drug supply house, but no one there acknowledged knowing Hubbard. Later that day, Bevell went to defendant's home for a follow-up interview. Defendant indicated that Hubbard had a boyfriend in another town, and that she regularly stole property from Wal-Mart. He also told Bevell that Hubbard sold pills and cocaine, and had multiple court cases pending. Bevell found nothing to substantiate any of defendant's statements.

On 3 August 2011, Bevell interviewed the Metzgers again at GPD and recorded defendant's statement in writing. The Metzgers offered conflicting accounts about when they had last seen Hubbard. The next day, on 4 August 2011, as a result of information gathered during the investigation and interviews with defendant's neighbors, law enforcement officers searched the woods behind defendant's home and

discovered Hubbard's body. While officers were searching the field, the Metzgers fled from their home but were eventually apprehended and arrested. At GPD, defendant was informed of and waived his Miranda rights and gave the following statement to Bevell:

> On Saturday, Jean came over so I could work on the car—about 2:00 pm. Ann went to the store, she went out somewhere. She left for an hour or so. While she was gone, Jean [and] I got in an argument.
>
> She was continually telling everybody I was trash and calling my sons [expletive] bastards. She slapped me - scratched me on the neck - kept slapping me - grabbed my arm.
>
> I told her to stop calling my kids names. I begged her to stop. She slapped me again [and] I grabbed her by the neck. Everything went blank for a few minutes. We stared at each other. When I realized what I was doing, I turned her loose - she fell on the floor.
>
> I was freaked out, I realized she wasn't breathing. She didn't have a pulse. I took her to the back closet [and] covered her up with a blanket until I could figure out what to do.
>
> Ann came home. I went ahead [and] fixed the car - the battery was dead. Didn't really do anything until about 9:30 - 10:00. We took the car for a ride. It was running O.K. Drove to Wilson [and] back. We took the car to Wal-Mart, got a Taxi, [and] came back to the house. That was about 11:30.
>
> Ann went to sleep about 12:30 or so. Probably 1:30 or 2:00 I went back [and] wrapped Jean in a sheet. Took her through the woods as far as I could carry her. I laid her in the bushes.

> When I came back in Ann asked me where I had been. I told her to sit down [and] told her what had habpened [sic]. I told her not to say anything. That's when we came up with the story of her dropping her off at the house. Until I could figure out what to do.
>
> Sometime Monday morning I hid the purse in the woods under the tree. I got it out of the shed.
>
> That's about it. That's all I can think of.

Following this statement, Bevell photographed a bruise on defendant's arm and a scratch on his neck, injuries he alleged were from Hubbard. Defendant also gave Bevell Hubbard's debit card and had $1,120 in his wallet.

Defendant was indicted for the offense of first-degree murder on 10 September 2012. The case was tried in Wayne County Superior Court on 8 October 2014.

At trial, the State presented evidence obtained from Hubbard's autopsy, which was performed by Dr. Jonathan Privette ("Privette"), an expert in the field of forensic pathology. During the autopsy, Privette found wounds consistent with strangulation and broken superior horns of the thyroid cartilage, or Adam's Apple. Privette stated that such fractures could be the result of manual and sometimes ligature strangulation. Additionally, there were two plastic grocery bags that had been placed over Hubbard's head and secured tightly around her neck. When asked by the prosecutor if the material of the bags was sufficient to explain ligature strangulation, Privette responded, "It could." According to Privette, the cause of Hubbard's death

was asphyxia, a "lack of oxygen . . . caused by strangulation and suffocation by the bags on top of the head." Privette also explained that there was bruising on Hubbard's neck where the bags were tied, that indicated the trauma most likely occurred shortly before or right around the time of death. During closing argument, the prosecutor stated that "[t]he medical examiner said the cause of death was a ligature strangulation . . . it's not a strangulation with the hand[,]" and that the plastic grocery bags were the murder weapon.

The State also presented evidence that Hubbard's murder was motivated at least in part by money. When Hubbard and defendant's adoptive mother died in 2011, Hubbard inherited everything, and nothing went to defendant. As a result of this inheritance, Hubbard had a substantial amount of money, totaling around $100,000 at one point. In 2010, when Hubbard's balance in her bank account was around $50,000 to $60,000, bank officials became concerned because Hubbard was giving Ann substantial sums of money. On 5 October 2010, Hubbard cashed a check at the bank for $2,000. When the bank's manager asked Hubbard if she was under duress or needed help, she told him that she needed the money because Ann's children had been kidnapped. The bank's fraud expert became involved, and opined that Hubbard was uncomfortable with the situation and wanted to stop giving money to Ann. Shortly before her death, on 29 July 2011, Hubbard visited the bank because she was concerned about having sufficient funds to pay her bills. At that time, the

balance in Hubbard's checking account was $95. After Hubbard's death, there were multiple withdrawals from the account, and surveillance footage showed defendant using Hubbard's debit card.

At the close of the State's evidence, defendant moved to dismiss the charge of first-degree murder, alleging that the State had presented insufficient evidence of "every element of the charge," and that there was a fatal variance between the crime alleged in the indictment and the State's evidence. The trial court denied this motion.

Defendant presented evidence from a clinical psychologist, Dr. Claudia Coleman ("Coleman"), who examined defendant after his arrest. According to Coleman, defendant suffered from post-traumatic stress disorder ("PTSD") and agitated depression, which impaired defendant's ability to plan and made him prone to impulsive decisions. Coleman also stated that, in her opinion, defendant's ability to appreciate the consequences of his actions was "very limited" as a result of these disorders. Defendant told Coleman during one of their sessions that he had placed the plastic bags over Hubbard's head to make sure that she was dead.

At the close of all the evidence, defendant renewed his motion to dismiss, again alleging the insufficiency of the evidence and a variance between the indictment and the evidence. The trial court again denied this motion. On 17 October 2014, the jury returned a verdict finding defendant guilty of first-degree murder. The trial court

sentenced defendant to life in prison without parole in the custody of the North Carolina Division of Adult Correction.

Defendant appeals.

II. Motion to Dismiss

Defendant contends that the trial court erred in denying his motion to dismiss the charge of first-degree murder because the evidence was insufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant formed the specific intent to kill after premeditation and deliberation. We disagree.

A. Standard of Review

"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).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (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. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any

contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

First-degree murder is the unlawful killing of another human being with malice, premeditation and deliberation. *State v. Misenheimer,* 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). "Premeditation means that [the] defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing[,]" and "[d]eliberation means that the intent to kill was formed while [the] defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation." *Id*. at 113, 282 S.E.2d at 795. "[P]assion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time." *Id.* (quoting *State v. Faust*, 254 N.C. 101, 108, 118 S.E.2d 769, 773 (1961).

"Ordinarily, premeditation and deliberation are not susceptible of proof by direct evidence, and therefore must usually be proved by circumstantial evidence. *State v. Love*, 296 N.C. 194, 203, 250 S.E.2d 220, 226-27 (1978). The following is a non-exclusive list of factors from which premeditation and deliberation may be inferred:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after

> the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Williams, 144 N.C. App. 526, 530, 548 S.E.2d 802, 805 (2001).

Defendant contends that the evidence at trial was insufficient to show premeditation. Specifically, defendant contends that "[t]here was no evidence of any hatred, ill will or violence between Gary Metzger and Jean Hubbard prior to the time of the killing." Moreover, defendant contends that the only evidence as to why the murder occurred came from defendant's own police interrogation, in which he described himself strangling Hubbard in response to her physical assault of him. Defendant contends that this evidence fails to establish premeditation, and that therefore the evidence, taken in the light most favorable to the State, was insufficient to support a conviction for first-degree murder.

Defendant's personal confession, however, was not the sole evidence of wrongdoing. The State presented evidence that defendant was aware of Hubbard's financial situation, that he and his wife were slowly depleting Hubbard's funds, that he accessed Hubbard's finances after her death, that he killed her via strangulation and hid the body, that he attempted to elude arrest, and that he lied to law enforcement officers until the very last moment. Defendant's admission to law enforcement officers, which he contends is the only evidence of how and why the

murder occurred, is only one piece of evidence, the credibility of which the jury was free to weigh.

A motion to dismiss must be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference, and resolving all contradictions in favor of the State. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. Even assuming, *arguendo*, that defendant's statement to law enforcement officers creates some ambiguity as to whether defendant acted in self-defense, we resolve that contradiction in favor of the State for the purpose of a motion to dismiss. In the instant case, there was evidence that defendant's crime was motivated by a desire for Hubbard's money, as evidenced by his actions in taking her money both before and after the murder. There was also evidence that the crime itself was particularly brutal, in that it included asphyxiation with plastic bags. Our Supreme Court has characterized a murder by strangulation as "vicious and brutal." *State v. Artis*, 325 N.C. 278, 311, 384 S.E.2d 470, 488 (1989) (citing *State v. Prevette*, 317 N.C. 148, 161, 345 S.E.2d 159, 167 (1986)), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). There was further evidence of defendant's guilty conduct after the fact, in that defendant lied to law enforcement officers and attempted to escape during their investigation. All of this evidence, taken in the light most favorable to the State and giving the State the benefit of every reasonable inference, supported a determination by the jury that defendant's acts were premeditated.

By contrast, the only evidence of provocation comes from defendant's own statements, which, inasmuch as they conflict with the State's evidence, will not be considered in reviewing a motion to dismiss. As such, we hold that the trial court did not err in denying defendant's motion to dismiss.

This argument is without merit.

III. Improper Closing Arguments

Defendant next argues that the trial court's failure to intervene *ex mero motu* during the prosecutor's closing argument deprived him of his constitutional right to due process of law under both the state and federal constitutions. We disagree.

A. Standard of Review

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

> "[W]e will not find error in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction fundamentally unfair." *State v. Allen*, 360 N.C. 297, 306-07, 626 S.E.2d 271, 280, *cert. denied*, 549 U.S. 867 (2006). In determining whether argument was grossly improper, this Court considers "the context in which the remarks were made," *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046 (1994), as well as their brevity relative to the closing argument as a whole, *see State v. Fletcher*, 354 N.C. 455, 484-85, 555 S.E.2d 534, 552 (2001) (reasoning that when

> "[t]he offending comment was not only brief, but . . . was made in the context of a proper . . . argument," it was not grossly improper), *cert. denied*, 537 U.S. 846 (2002).

State v. Taylor, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008).

B. Analysis

In the instant case, defendant contends that the following portion of the prosecutor's closing argument was so grossly improper as to require a reversal of the trial court's first-degree murder judgment:

> These are the five things and the only five things that the State has to prove to you beyond a reasonable doubt. The Judge will to you this [sic] in just a few moments. First, that the defendant or somebody he was acting in concert with intentionally and with malice killed the victim with a deadly weapon. That's not your classic deadly weapon, is it? (Holding up plastic shopping bags) Next time you go to the grocery store –
>
> But in this case this was the deadly weapon. The medical examiner said the cause of death was a ligature strangulation, and explained it to you. He said it's not – it's not a strangulation with the hand. That's not what this was. I can tell based upon the way these two bones were broken. It's a murder by an inanimate object. In this case, the edges of these two plastic bags put over the head and tied so tightly that the blood cannot go up and down and you couldn't breathe. And so this, this is the deadly weapon. That's how she died. Plastic grocery bags.

Defendant argues that the above statement during closing arguments that the medical examiner said the death was the result of ligature strangulation rather than

manual strangulation was not supported by the medical examiner's testimony as to the cause of death. However, trial counsel did not object during the closing argument.

Upon review of the record, we can understand the prosecutor's *lapsus linguae*. During the medical examiner's testimony, the subject of manual strangulation and ligature strangulation did arise. Specifically, the medical examiner was asked about the term "ligature," and noted that the type of injury in this case is "sometimes associated with a ligature-type strangulation." While the medical examiner stated that this type of injury *could* be sufficient to illustrate a ligature-type strangulation, he did not definitively state that it *did* in this particular case. Nonetheless, based on this testimony, and reviewing the overall sting of the State's closing argument in addition to this one small excerpt, we decline to hold that this minor slip of the tongue, relative to the closing argument as a whole, was "grossly improper." As such, we hold that the trial court did not err in declining to intervene in the State's closing arguments *ex mero motu*.

This argument is without merit.

IV. Conclusion

The evidence, taken in the light most favorable to the State, supported a finding of premeditation; therefore, the trial court did not err in denying defendant's motion to dismiss. Because the State's comments, taken in the context of its closing arguments as a whole and in light of the evidence at trial, were not grossly improper,

the trial court did not err in declining to intervene *ex mero motu* during the prosecutor's closing argument.

NO ERROR.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).