IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-650

Filed: 18 December 2018

Mecklenburg County, No. 16 CRS 247411

STATE OF NORTH CAROLINA

v.

CARICO RODRIQUEZ HAYWARD

Appeal by defendant from judgment entered 25 January 2018 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Marilyn G. Ozer for defendant-appellant.

TYSON, Judge.

Carico Rodriquez Hayward ("Defendant") appeals from judgments entered after a jury found him guilty of first-degree murder. We find no error.

I. Background

On 19 December 2016, Ellis "Duke" Bradham was reported missing. His body was discovered in a creek in Shuffletown Park on 23 December 2016. Crime scene

investigators recovered nine discharged 9 mm cartridge casings and three bullets or bullet fragments from the scene. No weapon was found at the scene. An autopsy revealed Bradham had died from multiple gunshot wounds. Bradham's wounds indicated he was shot from behind.

Police arrested Defendant and brought him in for questioning on 23 December 2016. During the course of the interview, Defendant admitted he had killed Bradham. Defendant was indicted on one count of first-degree murder.

The evidence admitted at trial tended to show, in relevant part: Bradham moved to Charlotte with his fiancé, Tavana Moore, and his two children in April 2016. They all moved in with Bradham's sister, Kenya Smith. Bradham met Defendant early in the summer of 2016, and they soon became "best friends."

Defendant had been dating Andrea Jones for about two years. Their relationship ended in the summer of 2016, though Defendant still had a phone that was registered in Jones' name and her children from another relationship were receiving food stamps issued through him. Jones began dating Bradham in fall 2016.

On 17 December 2016, Jones and Bradham spent the night together in an Embassy Suites hotel. They checked out between 11:00 a.m. and 12:00 p.m. on 18 December 2016, and Jones drove Bradham to his sister's house. Jones' last contact with Bradham occurred around 2:46 p.m.

Danielle Brown became involved in a relationship with Defendant while he was still dating Jones. Brown and Defendant continued their relationship after Jones and Defendant ended theirs. On the morning of 18 December 2016, Defendant asked Brown to drive him and another neighbor, Enoch Grimsley, to the Embassy Suites hotel. They waited in the parking lot until they saw Jones and Bradham emerge from and leave the hotel. Defendant became upset and cried. The trio left the hotel and went to Defendant's mother's house, where Defendant brought Bradham. Later, Defendant, Grimsley, and Bradham left the house. Defendant and Grimsley later returned without Bradham.

Grimsley testified that he, Defendant, and Bradham drove to Shuffletown Park. They talked in the car, then Defendant said "y'all come on" and they got out of the car and walked down a path. As they approached the creek, Defendant stopped, turned to face Bradham, pulled out a gun, and said, "I thought you was my friend."

Bradham tried to run, but tripped and fell. Defendant shot Bradham six or seven times. Defendant kept shooting Bradham, walking toward him while Bradham was on the ground. Grimsley started to run away, but was stopped by Defendant. They began walking back to the car, but then returned to the scene and moved Bradham's body into the creek.

Defendant had been fitted with an ankle monitor in October 2016, after he was released on bond following a domestic violence complaint. Officers removed his ankle

monitor after Defendant was arrested. Data of Defendant's whereabouts was downloaded. The ankle monitor showed Defendant was in the parking lot at the Embassy Suites hotel on 18 December 2016 from approximately 10:30 a.m. to 11:00 a.m. Defendant was also present in the area of Shuffletown Park beginning around 2:30 p.m. The location tracker showed Defendant's movement from the entrance of the park to the highway and back to the entrance at around 3:00 p.m. At 3:08 p.m., Defendant was back on the trail in the park, and by 3:10 p.m., Defendant was leaving the park for a final time.

During questioning, Defendant told police he and Bradham had looked for a place to shoot a stolen gun. They went to Shuffletown Park, and as they were walking down the trail, Bradham told Defendant he needed to say something. Defendant was already holding the loaded gun to practice shooting, and Bradham told him he was dating Jones. Defendant said he did not know what happened, that he "wasn't even thinking" when he squeezed the trigger, and he did not even realize he had killed Bradham.

Defendant testified at trial. He stated Bradham had asked him the night of 17 December to pick him up from the Embassy Suites hotel the next morning. Defendant and Brown drove to the Embassy Suites hotel and smoked marijuana in the parking lot. When Defendant texted Bradham that he was there, Bradham said he had left, and Defendant and Brown picked him up at his sister's house.

After going to the Concord Mills mall, Defendant testified he and Bradham went to pick up a previously stolen gun to sell. Defendant and Bradham went to Shuffletown Park to sell the gun, but the buyers were not there. After the two had left, the buyers texted Bradham to tell him they were at the park. Defendant and Bradham returned to the park, sold the gun, and left. Defendant drove back toward his mother's house, and Bradham got out of the car at a light before they reached the house.

Defendant testified he did not know Bradham and Jones were in a relationship until 22 December, when the police came by his house with documentation concerning another domestic violence charge by Jones. He stated he did not kill Bradham, he had no reason to kill him, and he was lying during the interrogation to "protect[]" his family.

The jury unanimously found Defendant guilty of first-degree murder on the basis of premeditation and deliberation and lying in wait. Defendant was sentenced to serve life in prison, without parole. Defendant timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the trial court erred in including additional language on jealousy in the jury instruction on deliberation. Defendant also argues it was plain error for the trial court to instruct the jury on lying in wait, but not on any lesser-included offenses to first-degree murder.

IV. Instruction on Deliberation

The State requested the jury instruction for the element of deliberation include additional language stating, "[w]ithout more, mere jealousy does not qualify as a violent passion." The additional language was given over Defendant's objections. We find no error in the trial court's addition to the deliberation instructions.

A. Standard of Review

"[T]he choice of instructions given to a jury is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003) (citation and quotation marks omitted).

B. Analysis

Defendant argues the additional language to the element of deliberation was an incorrect statement of law, which lessened the State's burden to prove every element of the offense and violated his constitutional rights to due process and trial before an unbiased jury. We disagree.

At the charge conference, the trial court stated it would use the pattern jury instructions on the substantive elements of first-degree murder, with the addition of some language at the end of the fifth element, deliberation, as requested by the State. The instruction read:

> Fifth, that the Defendant acted with deliberation, which means that the Defendant acted while the Defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the Defendant was in a state of passion or excited when the intent was carried into effect. Without more, mere jealously does not qualify as a violent passion.

The final sentence is a paraphrase from a decision by the Supreme Court of North Carolina. *State v. Porter*, 326 N.C. 489, 506, 391 S.E.2d 144, 156 (1990) ("Mere jealousy, without more, cannot be sufficient to negate deliberation.").

At the charge conference, defense counsel did not assert any constitutional grounds as the basis for his objection to the proposed instruction. Defense counsel stated, "I don't have case law that says you shouldn't do that, but we object and move that you consider the pattern jury instruction to be appropriate in this case."

During deliberations, the jury requested to hear the jury instructions on the substantive charges again. The trial court noted defense counsel's previous objections, and read the instructions again, including the above added instruction.

Appellate courts are "not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court."

State v. Golphin, 352 N.C. 364, 403-04, 533 S.E.2d 168, 197 (2000) (citations and quotation marks omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Upon review, neither Defendant's objection nor the trial court's response affirmatively raised or determined a constitutional issue. *See Golphin*, 352 N.C. at 403-04, 533 S.E.2d at 197. Presuming, *arguendo*, that the issue is properly before this Court, we conclude the trial court did not err in instructing the jury on the element of deliberation using language from *Porter*.

The trial court is not required to instruct the jury by using the language counsel requests, as the language used is a matter of discretion. *State v. Lewis*, 346 N.C. 141, 145, 484 S.E.2d 379, 381 (1997). "[W]here the trial court's instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, no error will be found." *State v. McClain*, 169 N.C. App. 657, 667, 610 S.E.2d 783, 790 (2005).

Defendant argues language from *Porter* regarding jealousy was taken out of context and was not correct. We disagree. The defendant in *Porter* was found to have shot and killed his girlfriend, apparently jealous she was not spending all her time at a dance hall with him. *Porter*, 326 N.C. at 494-96, 391 S.E.2d at 148-49. The defendant argued the trial court improperly instructed the jury on provocation and asserted verbal abuse and suspicions of adultery may be "sufficient to negate evidence of deliberation and thus reduce a crime from first-degree murder to second-degree murder." *Id.* at 506, 391 S.E.2d at 155. The Supreme Court held that even if the

defendant's assertion was a correct statement of law, it would not apply, as a woman wanting to dance with other people would not rise to the level of the insult or abusive language necessary to negate evidence of deliberation. *Id.* at 506, 391 S.E.2d at 155-56.

Defendant asserts the pattern jury instructions properly instruct that an event which suddenly occurs and greatly inflames the defendant's emotion must be present to negate the element of deliberation, but the statement "mere jealousy" implied to the jury that jealousy is insufficient to negate deliberation. However, "it is fundamental that the charge of the court will be construed contextually, and isolated portions will not be held to constitute prejudicial error when the charge as a whole is free from objection." *Id.* at 505, 391 S.E.2d at 155.

Evidence was presented of Defendant's apparent jealousy over the relationship between Bradham and Jones. The evidence showed Defendant was aware of this relationship at least three hours prior to the shooting, and Defendant probably had some prior knowledge, as he had asked Brown to drive him to the Embassy Suites hotel on the morning of 18 December. The essential element is the immediacy of the discovery, often requiring a defendant to catch the victim in the act. *State v. Ward*, 286 N.C. 304, 313, 210 S.E.2d 407, 414 (1974) ("The law extends its indulgence to a transport of passion justly excited and to acts done before reason has time to subdue it; the law does not indulge revenge or malice, no matter how great the injury or grave

the insult which first gave it origin."), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976).

Reviewing the jury instruction as a whole, we find no abuse of discretion or error in the instruction as given. *Porter*, 326 N.C at 505, 391 S.E.2d at 155. Defendant's argument is overruled.

V. Instruction of Lying in Wait Without Instructing on Lesser-Included Offenses

A. Standard of Review

"[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

Unpreserved error is subject to plain error review. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

B. Analysis

Defendant argues the trial court erred by instructing on lying in wait because the evidence was insufficient to support the theory. Defendant also argues the trial court plainly erred by not instructing on lesser-included offenses because the evidence of lying in wait was conflicting. *State v. Gause*, 227 N.C. 26, 30, 40 S.E.2d 463, 466 (1946) (where "more than one inference may be drawn from the evidence in respect

to lying in wait, it is error for the trial court to fail to charge the jury that a verdict of murder in the second degree may be returned."); *State v. Camacho*, 337 N.C. 224, 234, 446 S.E.2d 8, 14 (1994) (where the evidence of lying in wait was conflicting but all pointed to some criminal culpability, the jury should have been instructed on lesser-included offenses, and "should not have been required to choose only between guilty as charged or not guilty.").

As above, Defendant is purporting to raise a constitutional argument, which was not raised at trial. *Golphin*, 352 N.C. at 403-04, 533 S.E.2d at 197. Presuming Defendant's argument is properly before this Court, we find no error in the trial court's instructions and no plain error in its omission of instructions on lesser-included offenses.

First-degree murder under the theory of lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979). It is not necessary the assailant be concealed for the killing to qualify under the theory of lying in wait, as long as he created a situation to privately attack the victim, and the victim was unaware of the assailant's intention to kill him. *Id.* Further, specific intent is not a required element of murder committed by lying in wait. *State v. Leroux*, 326 N.C. 368, 379, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990).

There is no real conflict between the evidence presented of the murder. The State's witness, Grimsley, testified he, Defendant, and Bradham were walking down the path in the park when Defendant turned toward Bradham with a gun and began shooting. Defendant argues the admission in his interrogation that he "wasn't even thinking" when he shot Bradham, established a conflict in the evidence.

Even if Defendant did not intend to lie in wait to kill Bradham, he created a situation where he could privately attack Bradham by walking down an isolated path in the park. *See Allison*, 298 N.C. at 147, 257 S.E.2d at 425; *see also Leroux*, 326 N.C. at 379, 390 S.E.2d at 322. All evidence presented indicates Bradham did not know of Defendant's intentions. *See Allison*, 298 N.C. at 147, 257 S.E.2d at 425. Defendant's argument is overruled.

Defense counsel failed to request instructions on lesser-included offenses at the charge conference, so we review this error under a plain error review. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330.

> 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.

Id. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). Defendant has failed to meet this heavy burden.

As set forth above, the trial court did not err in instructing the jury on first-degree murder under the theory of lying in wait. Further, Defendant was found guilty of first-degree murder under the theory of lying in wait *and* premeditation and deliberation. Defendant has failed to show how the lack of instructions on lesser-included offenses, such as second-degree murder, had a probable impact on the jury finding him guilty. Defendant's argument is overruled.

VI. Conclusion

The trial court did not err in including additional language on "mere jealousy" from a Supreme Court opinion to the jury instructions because the instruction as a whole was not erroneous. *See Porter*, 326 N.C at 505, 391 S.E.2d at 155. No conflicting evidence on the theory of first-degree murder by lying in wait exists to support a finding that the trial court erred in instructing the jury on that element. *Allison*, 298 N.C. at 147, 257 S.E.2d at 425

Defendant did not request jury instructions for lesser-included offenses at trial. He has failed to prove it was a fundamental error for the trial court to omit those instructions. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Defendant received a fair trial, free from error. We affirm the jury's conviction finding Defendant guilty of first-degree murder and the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).