State v. Honeycutt

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UNPUBLISHED

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Dennis Bruce Honeycutt (Defendant) appeals a judgment dated 19 October 2001 entered consistent with a jury verdict finding him guilty of voluntary manslaughter.

The evidence at trial revealed Defendant lived in a house owned by Brenda Anderson (Anderson). Anderson had been Defendant's girlfriend for several years. On 3 January 1998, Anderson was out on the back porch of her home staining chairs when Defendant locked her out of the house. Approximately forty-five minutes later, Defendant let Anderson back in the house. Anderson went inside to search for her car key but discovered Defendant had taken it. Anderson then looked for her spare key. She found it and drove away in her car to let Defendant cool off for a couple of hours. When Anderson returned to her home during the afternoon, she found Defendant lying on the couch with his gun beside him. Defendant awoke and immediately began arguing with Anderson. Defendant told Anderson he was going to kill her and her two sons. Finally, around 5:30 p.m., Anderson telephoned her twenty-nine- year-old son Johnny Anderson (Johnny) to come and get her because Defendant had again taken away her car key. Not knowing how Defendant would react upon Johnny's arrival, Anderson also told Johnny to bring the police.

Anderson was hysterical and crying when Johnny arrived. Seeing the state Anderson was in, Johnny walked up to Defendant grabbed him by his shirt collar, and told Defendant he could not treat his mother this way and that he needed to leave. When Anderson said they should leave, Johnny followed Anderson to her car. It was only when Anderson sat down in her car that she noticed she did not have her car key.

Insisting they go back inside to get the missing car key, Johnny asked Anderson for the house key. Although Anderson warned Johnny that Defendant had a gun and had already threatened to kill her, she handed her house key over to him. Johnny then unlocked the front door to the house, and Anderson followed right behind him. As Johnny turned left toward the kitchen table where Anderson's car key lay, Defendant approached from the hallway to the right. Defendant called out he was going to kill Johnny and then shot Johnny four times. After the first two shots hit Johnny in the

chest, Johnny fell to the floor. Defendant then positionedhimself over Johnny and shot him once in both legs.

Anderson's neighbor, Sharon Miller (Miller), testified Defendant telephoned her after Anderson and Johnny had walked to Anderson's car. Defendant told her he had argued with Johnny and had telephoned 911. Defendant further stated he had locked the doors to the house and would kill Johnny if he came back inside. Miller cautioned Defendant to stay calm when she heard Defendant say "Johnny, I'm going to kill you." These words were followed by gunshots. Miller noted that she did not hear any other voice but Defendant's over the telephone line prior to the shots.

Defendant testified to a different course of events. According to Defendant, Johnny forced open the front door, hit Defendant in the chest, and knocked him backwards. Johnny threatened to kill Defendant, and Defendant only shot Johnny in self-defense. At the time of the incident, Defendant was taking medicine for heart disease, had pins in his left ankle and right heel, and weighed less than Johnny. Defendant also testified to an incident in January 1996 when Johnny had found Defendant and Anderson involved in an argument and had threatened Defendant if he did not leave immediately.

At the close of the State's evidence and at the close of all the evidence, Defendant moved to dismiss the charge against him. The trial court denied both motions.

During closing arguments, the State made the following comments to the jury:

It[] [is] not every case we[] [have] got atape of a man saying I[] [am] going to kill him if he comes in here. In fact, do you know how rare that is? And let me tell you this in case there[] [is] any confusion when you go back there. [Defendant is] not being tried for murder. Rightly or wrongly, I[] [am] not going to get into that. He[] [is] not being tried for that. There[] [are] elements in this case where you could argue it could be murder. He[] [is] not being tried for that. I[] [am] only trying him for voluntary manslaughter. He had the ability, he can plead guilty to this. Just because I[] [am] trying him does[] [not] mean there[] [is] any question about his guilt.

Defendant objected, whereupon the State concluded: "He could take responsibility." The trial court sustained the objection and instructed the jury as follows:

We live in the United States and our Constitution says that you have the right to plead not guilty. No one can force you to plead guilty to anything. You have your [c]onstitution[al] right to confront and cross[-]examine witnesses against you, and there is no duty on the defendant to plead guilty, to testify in his own behalf, or do anything to prove his innocence. All the burden rests upon the State to prove that the defendant is guilty.

Defendant moved for a mistrial based on the State's comments, but the trial court denied the motion.

Defendant, referring to the 1996 incident between Johnny and Defendant, requested the trial court instruct the jury that it would be allowed to consider the victim's prior threats in determining who the aggressor was and whether Defendant had been under a reasonable apprehension of danger. The trial court questioned the relevancy of the 1996 threat and denied Defendant's request for specific jury instructions, noting the Pattern JuryInstructions the trial court intended to use gave "sufficient language" to allow the jury to determine these issues. The trial court then instructed the jury that one of the factors it could consider was the victim's reputation, if any, for "danger[] and violence." Defendant also requested a special instruction, in line with the holding in State v. Johnson, 261 N.C. 727, 136 S.E.2d 84 (1964), on the "no duty to retreat" rule in one's home. The trial court denied this request as well, using the following Pattern Jury Instructions instead:

If . . . [D]efendant was not the aggressor and he was in his own home . . . , he could stand his ground and repel force with force regardless of the character of the assault being made upon him. However, . . . [D]efendant would not be excused if he used excessive force.

After jury deliberations had begun, the jury sent a note to the trial court requesting Defendant and his son be checked for weapons. The trial court allowed this request but sent a note back to the jury inquiring why it thought this was necessary. The jury responded: "Because . . . [D]efendant's son carried in a paper bag which could conceal a weapon." The trial court informed the jury that the paper bag contained only medication. The trial court then instructed the jury: "The evidence that you[] [are] supposed to be looking at . . . is what came from the witness stand and any exhibits that were introduced into evidence. This case is not about facial expressions, how people are dressed, it[] [is] about what happened on the date in question." Defendant moved for a mistrial based on the jury's request but was denied by the trialcourt. The jury then resumed its deliberations and returned with a guilty verdict.

The issues are whether: (I) the evidence was sufficient to overcome Defendant's motion to dismiss; (II) the trial court erred by rejecting Defendant's proposed jury instructions on (A) prior threats by the victim and (B) the "no duty to retreat" rule in one's home and (C) in instructing the jury Defendant could be found guilty of voluntary manslaughter if he was the aggressor; (III) the trial court abused its discretion in denying a mistrial following the jury's search request; and (IV) the trial court abused its discretion in denying a mistrial based on the State's improper comments during closing arguments.

I.

Motion to Dismiss

"Voluntary manslaughter is defined as 'the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation.'" State v. McNeil, 350 N.C. 657, 690, 518 S.E.2d 486, 506 (1999) (quoting State v. Rinck, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981)). "Generally,

voluntary manslaughter occurs when one kills intentionally[1] but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is used or [the] defendant is the aggressor." State v. Jackson, 145 N.C. App. 86,90, 550 S.E.2d 225, 229 (2001).

In this case, Defendant contends he did not commit voluntary manslaughter because he was acting in self-defense. Pursuant to the law of perfect self-defense, a killing is excused altogether if, at the time of the killing, these four elements existed:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). When the evidence in a homicide prosecution raises the issue of self-defense, the State bears the burden of proving the defendant did not act in self-defense. State v. Gilreath, 118 N.C. App. 200, 208, 454 S.E.2d 871, 876 (1995). The test on a motion to dismiss is thus whether the State has presented substantial evidence which, taken in light most favorable to the State, is sufficient to convince a jury the defendant did not act in self-defense. Id.

In this case, Defendant argues the State failed to meet its burden because the evidence neither shows Defendant was theaggressor, nor does it reveal use of excessive force. Contrary to Defendant's contention, however, there is ample evidence in the record from which to conclude that Defendant was indeed the aggressor. Anderson testified Defendant had threatened to kill her and her sons throughout the day on 3 January 1998. When she and Johnny entered her home, Johnny opened the door with Anderson's house key and went straight to the kitchen table to collect the car key. According to Anderson and Miller, Defendant then shot Johnny without any provocation. Although at trial Defendant claimed self- defense after being attacked by Johnny, his testimony was for the jury to weigh and is not of the kind properly considered in ruling on a motion to dismiss. See State v. Earnhardt, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982) (the trial court must disregard contradictions and discrepancies in the evidence and leave them for resolution by the jury). As there was substantial evidence that Defendant was the aggressor, the trial court did not err in denying Defendant's motion

to dismiss. [2]

II.

Jury Instructions

A.

Victim's Threats

At trial, Defendant pointed the trial court to the 1996incident between Johnny and Defendant, during which Johnny had threatened Defendant, and requested a special jury instruction on the relevance of previous threats made by a victim. Defendant contends the trial court should have permitted his request because such an instruction would have allowed the jury to better consider the issues of whether Defendant or the victim was the aggressor and whether Defendant suffered from a reasonable apprehension of death or great bodily harm.

"If a request is made for a jury instruction which is correct in itself and supported by the evidence, the trial court must give the instruction at least in substance." State v. Harvell, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). Defendant, however, has failed to cite any authority "that his proffered instruction was required or correct at law" and has thus waived appellate review of this issue. State v. Farmer, 138 N.C. App. 127, 134, 530 S.E.2d 584, 589, disc. review denied, 352 N.C. 358, 544 S.E.2d 550 (2000); N.C.R. App. P. 28(b)(6). Assuming for the sake of argument that Defendant's requested instruction was grounded in law, the trial court would nevertheless have been justified in denying the instruction because any threat made by Johnny in 1996, two years prior to his death, was too remote in time and too vague to justify the proffered instruction. See State v. Perry, 338 N.C. 457, 467, 450 S.E.2d 471, 477 (1994) (where evidence did not support the requested instructions because it would only support a finding that the threat had passed and would not support a rational finding that the defendant in fact believed it necessary to kill the deceased orthat any such belief was reasonable at the time the defendant shot the victim); State v. Kinney, 92 N.C. App. 671, 676, 375 S.E.2d 692, 695 (1989) (victim's past physical abuse of the defendant and victim's threat to beat the defendant thirty minutes before the shooting was held insufficient to warrant a self-defense instruction). We further note that the trial court did instruct the jury to consider Johnny's reputation for "danger[] and violence," thus permitting consideration of the fact that Johnny had grabbed Defendant by his shirt collar when he first arrived at the house on 3 January 1998. B

No Duty to Retreat

"'Where the . . . evidence when viewed in the light most favorable to the defendant discloses facts which are "legally sufficient" to constitute a defense to the charged crime, the trial court must instruct the jury on the defense.'" State v. Brown, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994)

(citation omitted). "If an instruction is required, it must be comprehensive." Id. When the facts of the case permit, a comprehensive self-defense instruction must include language regarding the defendant's right not to retreat in his own home. Id.

In State v. Johnson, our Supreme Court stated the "no duty to retreat" rule as follows:

Ordinarily, when a person who is free from fault in bringing on a difficulty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense,regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary.

State v. Johnson, 261 N.C. 727, 729-30, 136 S.E.2d 84, 86 (1964). In this case, the trial court's instruction regarding Defendant's duty to retreat embodied the substance of the holding in Johnson and thus of Defendant's requested instruction. See Harvell, 334 N.C. at 364, 432 S.E.2d at 129 (the trial court must provide the jury with the substance of an instruction requested by a party if the instruction is correct and supported by the evidence at trial). Accordingly, the trial court did not commit any error in reciting the Pattern Jury Instructions instead of Defendant's proposed instructions on the duty to retreat. C

Aggressor

Defendant next argues the trial court erred by repeatedly instructing the jury it could find Defendant guilty of voluntary manslaughter if he had been the aggressor. Defendant contends this was error because there is no evidence in the record from which to infer Defendant was the aggressor. This argument is without merit. Our above discussion on Defendant's motion to dismiss clearly establishes there was sufficient testimony by Anderson and Miller from which a jury could conclude Defendant was the aggressor.

III.

Weapon Search

Defendant also assigns error to the trial court's denial of his motion for a mistrial following the jury's request to have Defendant and his son searched for weapons because the request indicated potential jury tampering.

"It is the duty and responsibility of the trial judge to insure that the jurors remain impartial and uninfluenced by outside forces." State v. Rutherford, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984). Where a trial court is presented with evidence that a juror may have had outside contact, the trial

court must determine whether there was indeed any misconduct and whether the misconduct affected the impartiality of the jury. See id.

The trial court in this case sent an inquiry to the jury asking why the jurors wanted Defendant and his son to be searched. The answer revealed the jurors had observed Defendant's son enter the courtroom with a paper bag that could have contained a gun. There was thus no indication the jury had any outside contact and consequently no evidence of juror misconduct. As such, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial. See State v. Stroud, 78 N.C. App. 599, 604, 337 S.E.2d 873, 876 (1985) (a ruling on a motion for a mistrial is not reviewable absent an abuse of discretion by the trial court). [3] IV

Closing Argument

Finally, Defendant contends the trial court's instruction following the State's improper comment during closing arguments did not cure the comment's prejudicial effect. We disagree.

"[A] criminal defendant has a constitutional right to plead not guilty and be tried by a jury." State v. Larry, 345 N.C. 497, 524, 481 S.E.2d 907, 923 (1997). Thus, a reference by the State with respect to a defendant's failure to plead guilty violates his constitutional right to a jury trial. Id. Such error, however, will be deemed harmless where the trial court gives a curative instruction. See United States v. Smith, 934 F.2d 270, 275 (11th Cir. 1991) (the State's argument that the defendant had "'not taken responsibility for his actions'" because he refused to plead guilty was "improper, but . . . the error was harmless" where a curative instruction was immediately given and "there was ample evidence to convict [the defendant]").

In this case, the State's comment on Defendant's failure to plead guilty constituted error; nevertheless, this error was cured by the trial court's subsequent instruction that "there is no duty on the defendant to plead guilty, to testify in his own behalf, or do anything to prove his innocence," emphasizing that "the burden rests upon the State to prove that the defendant is guilty." Wereject Defendant's argument that this instruction was inadequate because it did not specifically tell the jury that the State's comment was improper and therefore should be disregarded. The trial court's instruction did not allow the jury any inference other than the fact that the State had made an impermissible comment which the jury was to disregard. Accordingly, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

No error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).