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NO. COA01-761

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v.

Davidson County
No. 00 CRS 182

LARRY WAYNE MAHAN

Appeal by defendant from judgment entered 19 December 2000 by Judge Wm. Erwin Spainhour in Davidson County Superior Court. Heard in the Court of Appeals 17 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Allison S. Corum, for the State.

Jon C. Michael for defendant appellant.

McCULLOUGH, Judge.

Defendant Larry Wayne Mahan was tried before a jury at the 27 November 2000 Criminal Session of Davidson County Superior Court on charges of first-degree murder (non-capital). Evidence for the State showed that on the night of 8 January 2000, the victim, Darryl Mahala, his sister Lisa White, and others went to the Philadelphia Corner Restaurant to have dinner. Defendant was also there at the restaurant. Defendant made a crude comment toward Ms. White as she made her way past where defendant was seated. Ms. White told him to keep his comments to himself.

At approximately 2:00 a.m., the victim, his sister, and their

friends exited the restaurant to go home. While this group was at Ms. White's car, defendant also exited the restaurant and headed to his car. Defendant's car was parked one space over from the White vehicle. As defendant passed Ms. White he made another comment. The victim then asked defendant, "Hey, buddy what the f___ is your problem?"

A squabble then ensued between defendant and the victim. At some point, somebody said something about a gun. The victim had grabbed defendant by the throat area, while defendant had the victim by the shoulder. Defendant pulled out a gun and pointed it at the victim's head exclaiming, "I'll kill you, motherf___er, I will kill you," while the victim screamed, "Put the f___ing gun down, put the f___ing gun down." Defendant pulled the trigger several times but the gun did not fire.

The battle continued in defendant's van after the misfire. The victim had defendant pushed down against the driver's seat, hanging across the center console. As defendant continued to try to fire his gun, Ms. White went to her car to retrieve her .38 revolver. She attempted to pass the gun to her struggling brother, and the gun fired in the exchange, shattering the passenger window. At this point, according to the State's witnesses, the defendant dropped his gun, grabbed the gun away from the victim, and shot him.

Defendant testified at trial as to his version of what occurred that night. According to defendant, he noticed Ms. White while at the bar. They briefly spoke and then she left the bar.

Defendant then asked one of the men in the group with Ms. White who she was. The person replied that Ms. White was his girlfriend, to which defendant replied that he did not believe him. Defendant then made a rather crude comment about Lisa, which he then repeated to Ms. White. Darryl Mahala, the victim, confronted defendant in the restroom a little later about the comment. Defendant explained that he meant no disrespect. Defendant then testified that he attempted to leave the restaurant, but could not because his vehicle was blocked.

Not until a few minutes after Ms. White, Darryl, and others left did defendant decide to leave. Defendant testified that he waited to give them time to leave, but they were still in the parking lot when he left.

From here on out, defendant's testimony differs from the account of events presented by the witnesses for the State. According to defendant, he went straight to his vehicle and got into it without saying a word to the group around the nearby car. Defendant heard someone say, "Darryl don't, Darryl, come back." That is when the victim, Darryl Mahala approached him. Defendant got out of his vehicle to see what he wanted. The victim said, "What the f___ is your problem?" Another member of the group said, "Darryl says if I ever hear you disrespecting my sister you are going to have to deal with me." Darryl repeated the threat, to which defendant responded, "Whatever." Defendant then tried to get back into his vehicle when the victim grabbed him by the arm and attempted to pull defendant out of the vehicle. Unsuccessful in

his attempt to remove defendant from the vehicle, the victim started to choke defendant. At this point, defendant informed him that he had a gun. Defendant did not actually have his gun in his hands, but according to him, just wanted to scare the victim so he would release him. Defendant testified that the victim held his hands up and someone placed a gun in his hand, which he pointed at defendant. Defendant then reached to get his gun and point it at the victim. The victim demanded that defendant lower his weapon, which he did. The victim came towards defendant, who then tried to open the passenger side door and "rack his gun." The victim then pinned defendant down on the seat, resumed choking defendant, pointed the gun at defendant's head, and screamed, "I'm going to kill you, you motherf___er. I will blow your brains out[.]" Defendant then raised his gun to the victim's head and pulled the trigger, but the gun did not fire. The victim continued to scream, "I'm going to kill you. You are a dead man." Defendant then jumped up, causing the victim's gun to fire and crease defendant's cheek. The two then struggled over the gun that the victim still possessed. Defendant was trying to push the gun away from him. During the course of the struggle, the gun discharged numerous times. Darryl Mahala received the only wounds.

During the fatal struggle, Darryl Mahala had possession of the gun according to defendant. The gun was near the victim's chest. Defendant testified that he had one hand on the victim's wrist and the other over the gun in an attempt to push the gun away from him. Defendant did not know where the gun was pointed.

Darryl Mahala died from four gunshot wounds from Ms. White's .38 revolver. The defendant was indicted on 3 April 2000 for first-degree murder. The offenses of first-degree murder, second-degree murder, and voluntary manslaughter were submitted to the jury. Defendant requested the trial court to instruct the jury on involuntary manslaughter and accidental homicide. The trial court denied these requests, and defendant appeals from these denials.

The jury convicted Larry Wayne Mahan of voluntary manslaughter on 1 December 2000. He was sentenced to a minimum term of 46 months and a maximum term of 65 months.

Defendant makes several assignments of error and brings forth the following arguments on appeal: (1) defendant is entitled to a new trial because the trial court failed to submit an instruction to the jury on involuntary manslaughter when evidence was presented that could have supported a verdict of involuntary manslaughter; (2) defendant is entitled to a new trial because of the trial court's failure to submit an instruction to the jury on the defense of accidental homicide when the defense arose from the evidence presented; and (3) the evidence presented was insufficient for a conviction of voluntary manslaughter, and the verdict must be set aside as against the weight of the evidence.

I.

Defendant first contends that the trial court erred by denying his request for an instruction on involuntary manslaughter. Defendant argues that because involuntary manslaughter is a lesser-included offense of murder and the evidence at trial supported a

possible verdict of involuntary manslaughter, the instruction should have been given. A defendant is "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)).

Defendant was charged with first-degree murder. Involuntary manslaughter is a lesser-included offense to the charge of murder. *State v. Green*, 314 N.C. 649, 336 S.E.2d 87 (1985).

"Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994). We have also defined involuntary manslaughter as "the unintentional killing of a human being without malice proximately caused by (1) an unlawful act [neither] amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *Id.*

State v. Bruton, 344 N.C. 381, 392, 474 S.E.2d 336, 344 (1996).

Defendant argues that the present case is controlled by the line of cases that "support the proposition that involuntary manslaughter can be committed by the wanton and reckless use of a deadly weapon such as a firearm" *State v. Buck*, 310 N.C. 602, 605, 313 S.E.2d 550, 552 (1984); see also *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983); *State v. Lytton*, 319 N.C. 422, 355 S.E.2d 485 (1987); *State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). We agree.

The facts in the present case are analogous to the facts in *Lytton*. In that case, the defendant fired a warning shot to keep the victim at bay. However, the victim continued approaching and a struggle ensued. Two more shots were fired during the struggle, killing the victim. "As to these shots, defendant testified that he did not intend to pull the trigger, did not aim the pistol, and did not form the intent to shoot [the victim]." *Lytton*, 319 N.C. at 427, 355 S.E.2d at 488. The State argued that because his finger was on the trigger when the pistol went off and that testimony from eyewitnesses was to the effect that the shots came as the victim was trying to escape, the evidence was "insufficient to show that the killing was unintentional." *Id.*

The Supreme Court said that "[c]onflicts in the evidence are for the jury to resolve, not this Court." *Id.*; see *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979). Thus, the *Lytton* Court held that, because "there was competent evidence that the killing was unintentional, we cannot say as a matter of law that the killing was otherwise." *Id.*

We believe this case presents the same situation. Although defendant did not testify directly that he did not intend to shoot the victim or aim the pistol, his testimony is tantamount to it. Defendant testified that he had his hand on the wrist of the victim and the other hand on the gun, and was simply trying to push the gun away from him during the struggle:

A. [Defendant]: . . . I wasn't sure that it wasn't away from me. I didn't have any idea where those bullets were going. I heard bang,

bang, bang. The gun stopped firing.

Q. Describe for the jury how you are [sic] struggling with [the victim] over the gun.

A. Darryl, the gun itself, I couldn't tell you exactly where it was pointed. I know Darryl was trying to push against me and I was pushing forward trying to keep it away from me is what I was trying to do.

Q. Was the barrel up or down?

A. I don't know. I don't have any idea.

Q. What happened next as you were struggling, what happened?

A. The gun went off numerous times. I let go of his wrist and I seen [sic] his head look up, more or less, that's just the way he was sitting. I crawled out of the window.

The defendant's testimony, if believed, could support a verdict of involuntary manslaughter. It is reversible error for the trial court not to submit to the jury such lesser included offenses to the crime charged as are supported by the evidence. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970).

More recently, this Court has addressed this issue at length in *State v. Tidwell*, 112 N.C. App. 770, 436 S.E.2d 922 (1993). *Tidwell* involved a husband with a gun to his head and his wife attempting to prevent his suicide. The husband was fatally shot during the struggle for control of the gun. This Court said:

[T]he issue has been resolved by our Supreme Court which has consistently held that where there is evidence that the victim was unintentionally killed with a deadly weapon during a physical struggle with the defendant, the trial court should charge the jury on the offense of involuntary manslaughter.

In *State v. Lytton*, 319 N.C. 422, 355 S.E.2d 485 (1987), the defendant's evidence tended to show that he and the victim engaged in an oral dispute. The defendant then fired his pistol at the ground as a warning to the victim to keep his distance. The victim did not heed the warning and continued to approach the defendant. A struggle ensued during which the victim was shot twice. The defendant did not aim the gun, pull the trigger or intend to shoot the victim. The Court held that this evidence required the trial court to give the defendant's requested instruction on involuntary manslaughter.

In *State v. Buck*, 310 N.C. 602, 313 S.E.2d 550 (1984), the defendant's evidence tended to show that the victim initially approached the defendant wielding a pocketknife. The defendant was frightened and obtained a knife from a nearby countertop. A struggle between the two armed men ensued during which the defendant unintentionally stabbed and killed the victim. The Court held that this evidence was sufficient to warrant submission of a possible verdict of involuntary manslaughter.

In *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983), the defendant's evidence tended to show that he and the victim were arguing when the victim reached for a gun laying on the bedroom dresser. Defendant grabbed the gun from under the victim's hand and was attempting to throw the gun across the room when it discharged and killed the victim. The Court held that the jury could have found that the defendant acted with culpable negligence from the manner in which he handled the cocked and loaded pistol, "*even under the circumstances as he described them.*" (Emphasis added.) *Id.* at 146, 305 S.E.2d at 551. The Court noted that:

[W]ith few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon or . . . under circumstances not

evidencing a heart devoid of a sense of social duty, is involuntary manslaughter.

Id. at 146, 305 S.E.2d at 551-52 (quoting, *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 893 (1963)).

Based on the foregoing decisions of our Supreme Court, we are bound to hold, even under the circumstances as described by defendant, that the trial court erred by refusing defendant's request to instruct the jury on the offense of involuntary manslaughter.

State v. Tidwell, 112 N.C. App. 770, 775-76, 436 S.E.2d 922, 926-27 (1993).

The State contends that it is not rational to infer that defendant abandoned his previous attempts to kill Darryl Mahala to protect himself or that the revolver went off four times without defendant intentionally pulling the trigger. This, however, is for the jury to decide. Evidence before the jury would allow it to determine that the gunshot wounds were a direct result of the struggle between defendant and the victim, and not any intentional act by defendant. See, e.g., *State v. Best*, 59 N.C. App. 96, 295 S.E.2d 774 (1982); *State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971).

Because we conclude that the trial court committed reversible error in failing to submit involuntary manslaughter as a possible verdict, we find it unnecessary to reach defendant's other assignments of errors.

Reversed and remanded for new trial.

Judges WYNN and BIGGS concur.

Report per Rule 30(e).