NO. COA11-527
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Forsyth County
No. 08 CRS 59333

CHRISTIAN NUNEZ PASCASIO

Appeal by defendant from judgment entered 7 December 2010 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd, for the State.

Mary March Exum, attorney for defendant.

ELMORE, Judge.

Christian Nunez Pascasio (defendant) appeals from judgment entered upon jury convictions of 1) first degree murder and 2) discharging a weapon into an occupied vehicle. After careful consideration, we find no error.

Shortly after midnight on 24 August 2008, defendant and several friends were riding in a Toyota Tacoma pickup truck

towards the Sagebrush restaurant in Kernersville. They planned to meet Josh Atkins and his father at the restaurant that evening to settle a dispute. Atkins and his father arrived at the restaurant first, separately. Atkins's father drove a black Chevrolet Tahoe. He arrived at the restaurant moments before defendant and his friends. As the pickup truck transporting defendant approached the restaurant, Atkins's father was still operating his vehicle. The two vehicles then began moving towards each other. One of defendant's friends said "that's them." Defendant then opened fire from the bed of the truck, and discharged fifteen rounds from a semiautomatic nine-millimeter handgun in the direction of the Tahoe. One of the bullets struck Atkins's father in the back, traveled through his lungs, and killed him. Defendant and his friends then left the scene and drove to Parkland High School. Officers of the Winston-Salem Police Department arrested them there.

Defendant later gave a videotaped statement to the officers, admitting that he fired the shots. On 1 June 2009, defendant was indicted for 1) first degree murder and 2) discharging a weapon into an occupied vehicle. At trial, defendant testified that he never intended to shoot the gun. Also at trial, the State played defendant's videotaped statement

to the jury. At the conclusion of all evidence, the trial court instructed the jury on first degree murder, felony murder, and second-degree murder. Defendant also requested that the trial court instruct the jury on 1) involuntary manslaughter and 2) the defense of voluntary intoxication. The trial court denied both of those requests.

On 7 December 2010, the jury found defendant 1) guilty of first degree murder under the felony murder rule and 2) guilty of discharging a firearm into occupied property. The trial court then sentenced defendant to life imprisonment without parole in the North Carolina Department of Correction. Defendant now appeals.

Defendant first argues that the trial court erred by denying his motion for a jury instruction on involuntary manslaughter. We disagree.

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (quotations and citations omitted). "Involuntary manslaughter has been defined as the unlawful and unintentional killing of another without malice which proximately results from

an unlawful act not amounting to a felony [and not] naturally dangerous to human life[.]" *State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 40 (2000) (quotations and citations omitted) (alterations in original).

Here, the evidence would not rationally permit the jury to find defendant guilty of involuntary manslaughter. The record indicates that defendant fired fifteen shots from a semiautomatic handgun towards an occupied vehicle. This act is clearly dangerous to a human life. Furthermore, the jury was presented with the videotaped statement of defendant in which he admitted to firing the shots. Therefore, we conclude that the trial court did not err in denying defendant's motion for a jury instruction on involuntary manslaughter.

Defendant next argues that the trial court erred by giving the jury an erroneous limiting instruction based on the 404(b) evidence offered at trial. We disagree.

When analyzing errors in limiting instructions, this Court follows the rule that "[i]f the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. Furthermore, insubstantial technical errors which could not have affected the result will

not be held prejudicial." *State v. Chandler*, 342 N.C. 742, 752, 467 S.E.2d 636, 641 (1996) (quotations and citations omitted).

Here, Jose Colunga testified for the State that defendant had fired the same gun at a different vehicle about a month before the shooting at issue. The State offered this evidence "to show defendant's knowledge of the murder weapon and its operation." The trial court later offered a limiting instruction as to this testimony, stating in sum that "defendant may have discharged a firearm at some ***person***" but that "you alone determine what any evidence does or does not show." It is clear from the record that the trial court's characterization of Colunga's testimony was inaccurate. Colunga clearly testified that defendant had fired the gun at a ***vehicle***, and not at some ***person***. However, the record also indicates that the State only offered this testimony to show that defendant had simply fired the weapon at some point prior to the shooting at issue here. The subject at which he fired the weapon had no bearing on the proffered purpose for the testimony's admission. Therefore, we conclude that the trial court's limiting instruction, while in part factually inaccurate, was nonetheless sufficient.

Defendant next argues that the trial court erred by denying his motions for a mistrial, when a female juror was threatened

by Hispanic trial witnesses and defendant is Hispanic. We disagree.

> The decision to grant or deny a mistrial lies within the sound discretion of the trial court and is entitled to great deference since [the trial court] is in a far better position than an appellate court to determine the effect of any [misconduct] on the jury. Absent an abuse of discretion, therefore, the trial court's ruling will not be disturbed on appeal. An abuse of discretion occurs when a ruling is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision.

Taylor, 362 N.C. at 538, 669 S.E.2d at 260 (quotations and citation omitted) (alterations in original).

Here, a female juror informed a security guard that she felt threatened by several Hispanic people in the courthouse hallway. The security guard informed the trial court of the juror's concerns. The trial court then held two hearings with the juror to further investigate the incident, and to determine if the incident would affect the juror's ability to render a fair verdict. At the first hearing, the trial court found that "[the juror] indicated that she could 100 percent base her verdict on the evidence that she heard in the trial and the law as I give it to her." At the second hearing the juror again indicated that she could base her verdict solely on the law and the evidence. Based on these findings, the trial court denied

defendant's motion for a mistrial. Therefore, we conclude that the decision of the trial court was supported by reason, and the trial court did not abuse its discretion.

Defendant next argues that the trial court erred by refusing to instruct the jury on accident. We disagree.

"Where . . . the evidence is uncontroverted that the defendant was engaged in unlawful conduct and acted with a wrongful purpose when the killing occurred, the trial court does not err in refusing to submit the defense of accident." *State v. Riddick*, 340 N.C. 338, 343, 457 S.E.2d 728, 731-32 (1995). Here, no credible evidence was presented at trial to support an instruction on accident. As already noted, the evidence indicates that defendant fired fifteen shots from a semiautomatic weapon towards an occupied vehicle. Therefore, defendant was clearly engaged in unlawful conduct with an unlawful purpose. Accordingly, we conclude that the trial court did not err by refusing to instruct the jury on accident.

Defendant next argues that the trial court erred by denying his request for a jury instruction on voluntary intoxication. Specifically, defendant argues that at the time of the shooting he was so intoxicated that he could not have formed the

requisite intent to shoot into an occupied vehicle or to commit premeditated and deliberate murder. We disagree.

"In order for an instruction on voluntary intoxication to be required the evidence must be that defendant's intoxication rendered him utterly incapable of forming a deliberate and premeditated intent to kill. Mere intoxication is not sufficient to meet this burden." *State v. Brown*, 335 N.C. 477, 492, 439 S.E.2d 589, 598 (1994) (quotations and citation omitted).

Here, the record fails to establish that defendant's intoxication rendered him utterly incapable of forming the intent to kill. Defendant testified at trial that he began drinking around 12:00 PM or 12:30 PM prior to the shooting. He also testified that he smoked marijuana and "did a little bit of coke." As already noted, in *Brown* our Supreme Court ruled that mere intoxication is not sufficient for an instruction on voluntary intoxication. In *Brown*, the trial court found that the defendant had consumed approximately ten or eleven beers prior to the murder. *Id*. On appeal, our Supreme Court concluded that "[t]he evidence . . . suggests that defendant was intoxicated to some degree, but nothing in the record, taken in the light most favorable to defendant, suggests that his degree

of intoxication approached the level necessary to support an instruction on the defense of voluntary intoxication." *Id.* For similar reasons, we conclude that nothing in the record here suggests that defendant's degree of intoxication approached the requisite level. Accordingly, the trial court did not err in denying defendant's request for a jury instruction on voluntary intoxication.

Lastly, defendant argues that the trial court erred by forbidding defense counsel from arguing to the jury that defendant was drunk or intoxicated on the evening of the murder. Specifically, defendant argues that the State in its closing argument made reference to defendant's "alleged voluntary intoxication," and that defendant's counsel was precluded from addressing defendant's level of intoxication in his own closing argument. Defendant argues that the trial court committed prejudicial error. We disagree.

"A defendant is prejudiced [by an error] when 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. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (citations and quotations omitted). "Voluntary intoxication is not a legal

excuse for a criminal act; however, it may be sufficient in degree to prevent and therefore disprove the existence of a specific intent such as an intent to kill." *State v. Torres*, 171 N.C. App. 419, 422, 615 S.E.2d 36, 38 (2005) (quotations and citation omitted). However, "intent to kill is not an element of felony murder[.]" *State v. Cummings*, 353 N.C. 281, 298, 543 S.E.2d 849, 859 (2001) (citation omitted).

Here, the jury found defendant guilty of first degree murder under the felony murder rule. Since intent to kill is not an element of felony murder, there is no reasonable possibility that a different result would have been reached at trial if defendant's counsel had been permitted to argue to the jury that defendant was drunk or intoxicated. Accordingly, the trial court did not err by forbidding defense counsel from making this argument.

No error.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).