NO. COA00-1238

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v. Guilford County
No. 98 CRS 52504
No. 98 CRS 23361

MARC ANTHONY FARRAR,
Defendant.

Appeal by defendant from judgments entered 26 May 1999 by Judge Sanford L. Steelman, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 October 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

Mark E. Hayes, for the defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions for first degree murder and first degree kidnapping. Defendant was found guilty of both charges by a jury trial at the 10 May 1999 Criminal Session of Guilford County Superior Court. Defendant brings forward nine assignments of error in his appeal. We hold that his trial was free of prejudicial error.

Before addressing defendant's arguments, we summarize some of the pertinent evidence. Defendant met the victim, Aaron Hendricks, when both were in prison. At the time, defendant was serving a ten

year sentence for second degree murder and armed robbery. After both were released, they entered into business together dealing drugs.

In November 1997, defendant rented an apartment on Cotswold Terrace in Greensboro, in which he resided with Denise Williams. In early February 1998, the defendant's relationship with Williams was "really going downhill," and defendant moved out. Over the ensuing days, defendant stayed either in a hotel or at his sister's home. On the evening of 19 February 1998, defendant was at his sister's house, drinking and smoking marijuana up until about 11:30 p.m. He received a phone call from Williams, and shortly thereafter, Williams picked up defendant. Defendant claimed that he became angry when he learned from papers in Williams' car that Hendricks was listing the Cotswold apartment as his residence. Defendant ordered Williams to take him to Cotswold, so he could throw out her belongings. When they arrived, defendant let himself in and discovered Hendricks in the apartment. The State's evidence was in essence that Hendricks owed defendant five thousand dollars from a drug deal, and that Williams arranged the encounter to help defendant collect his money.

Whatever the reason for the meeting, the two men began to argue once they saw each other. Defendant claimed that, during the argument, Hendricks charged at him, and defendant shot Hendricks once in the chest with a .38 caliber gun. Seconds later Williams shot Hendricks in the head with a .22 caliber gun. Hendricks was still alive, but shaking and not speaking, when defendant and

Williams loaded him into her car. Defendant drove through Greensboro to a warehouse parking lot, where Hendricks was unloaded and shot twice in the head at close range. Defendant's evidence was that Williams accompanied him in the car, and that she fired the shots in the parking lot. The State's evidence was that defendant acted alone. The evidence was not disputed that it was defendant who drove away leaving the body on the ground. After defendant's arrest, his brother turned over the .22 caliber and the .38 caliber guns to the police investigators. Defendant's brother told investigators that defendant had asked him "to put the guns away" shortly after the shooting.

Defendant admits that he shot Hendricks once in alleged self-defense at the Cotswold Terrace apartment, but contends that it was Williams who fired the shots at the warehouse parking lot. Forensic evidence tended to show that any one of the four shots eventually could have been fatal. The jury convicted defendant of first degree kidnapping and first degree murder based on both "malice, premeditation and deliberation," and felony murder; on both theories the jury based its verdict on defendant acting in concert with Williams. Following the capital sentencing hearing, defendant was sentenced to life imprisonment without parole for the murder, followed by 116 to 149 months imprisonment for the kidnapping. Additional evidence will be discussed as necessary to understand particular issues.

I

We address defendant's assignments of error in the order he

presented them in his brief. First, defendant contends that his pretrial statements should have been excluded by the trial court, because they were obtained involuntarily and in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We disagree.

Before trial, defendant filed a motion to suppress his pretrial statements. The trial court heard the motion and made findings of fact based on the testimony of officers of the Greensboro Police Department. The extensive findings include the following, which are supported by the testimony of Officer B.S. Williamson:

> e) That the [defendant] represented himself to be "Nelson." That he had no identification.
>
> . . .
>
> j) That the defendant did not appear to be under the influence of any intoxicants and that the defendant appeared to be "normal."
>
> k) That the defendant became angry when his relatives gave the Greensboro Police Department his true name.
>
> l) That the defendant was identified as the suspect in the shooting and was placed under arrest by Officer Williamson.
>
> m) That the defendant was detained in the back of a police car near 216-B York Street for a period of approximately twenty minutes.
>
> n) That during the time that the defendant was in the police car he was awake and calm.
>
> o) That immediately after he was arrested, the officer verbally advised the defendant of his Miranda rights. That he used the Greensboro Police Department advice of rights card and read each of the rights to the defendant.
>
> p) That the defendant closed his eyes and would not respond to that advice of rights.

q) That the defendant would not respond to questions posed by Officer Williamson.

The court made further findings based on the testimony of Officers G. T. Lowe and G. M. Naquin, on-duty officers, who observed defendant around the time he was apprehended, and who corroborated Williamson's evidence as to defendant's appearance. Detectives Sizemore, Edwards, and Rankin testified regarding events at the Guilford County jail. Detectives Sizemore and Edwards were the first to interview defendant, and, at defendant's request, Detective Rankin interviewed him later in the day. The court's findings include numerous segments taken directly from the testimony of the Officers and Detectives, for example:

g) Detective Sizemore offered to allow the defendant to have something to drink, cigarettes, and the use of the restroom.
h) That the defendant did not respond directly to the questions of Detective Sizemore, but repeatedly stated "My head hurts" and "I love her."
i) The defendant did not appear to be injured or intoxicated.
. . .
k) That the defendant sat at an interview table and did not make eye contact with the Detective.
l) That at one point Detective Sizemore left and returned to find the defendant sitting on the floor with his eyes closed but his mouth was moving. The defendant would not respond to the officer's statements.
. . .
q) The defendant was able to hear, understand and comply with the Detective's directions in regard to removing his clothing and getting dressed in jail attire.
r) Thereafter, Detective Sizemore supervised the administration of a hand-wiping test for the collection of gunshot residue at approximately 4:30 a.m.
s) The defendant was able to hear, understand

> and comply with the Detective's directions in regard to the administration of the hand-wiping test.
> t) During the rest of the time that the defendant was with Detective Sizemore, the defendant did not ask to go to sleep.
> u) That from 4:30 a.m. to approximately 7:00 a.m., the defendant was alone in the interview room. That the defendant did not go to sleep. That the defendant was observed sitting at the table, smoking cigarettes.

At 8:25 a.m., defendant signed a waiver of rights form and gave a statement to Detective Edwards. Defendant made additional statements over the next few days. The trial court's findings of fact were fully supported by the competent evidence in the record.

Pursuant to *State v. Hyde*, 352 N.C. 37, 44-5, 530 S.E.2d 281, 287-88 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001), we next address whether the trial court's findings of fact support the conclusions of law.

> The trial court's conclusion of law that defendant's statements were voluntarily made is a fully reviewable legal question. [T]he court looks at the totality of the circumstances of the case in determining whether the confession was voluntary. Factors the court considers are whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. at 45, 530 S.E.2d at 288 (internal citations and quotations omitted).

The trial court denied defendant's motion to suppress,

concluding as a matter of law that on 20 February, 23 February, and 24 February 1998, "the defendant did knowingly, voluntarily, and understandingly [waive] his rights as guaranteed by the 5th and 6th Amendment[s] to the United States Constitution." The court found as fact that defendant was coherent when arrested, did not appear to be under the influence of any intoxicating substances, spoke when he chose to speak, and cooperated when he chose to cooperate. The findings do not indicate that defendant was deceived, threatened, or coerced; and the findings do not show that any aspect of his mental state rendered his choices involuntary. These findings are supported by the record, and in turn support the trial court's conclusions of law. Under the totality of these circumstances, we conclude that defendant voluntarily waived his *Miranda* rights and gave statements to the police. This assignment of error is overruled.

II

In his second assignment of error, defendant contends that the trial court committed prejudicial error by denying his oral motions to continue the pretrial hearing on his suppression motion and for funds to retain an expert to determine "the effects of the chemical make-up [of ammonia] and its effect on the defendant's purported waiver of his constitutional rights." Defendant contends that by denying these motions, the trial court denied his rights to due process and to counsel as guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and the North Carolina Constitution. We disagree.

Ordinarily, the standard of review of the denial of a motion to continue is whether the trial court abused its discretion. *See Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873, *disc. rev. denied*, 354 N.C. 219, 557 S.E.2d 531 (2001); *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). "[A]bsent a gross abuse of that discretion, the trial court's ruling is not subject to review." *Walls*, 342 N.C. at 24, 463 S.E.2d at 748. However, "[w]hen a motion for continuance raises a constitutional issue, the trial court's ruling is a question of law and is fully reviewable on appeal." *State v. Cody*, 135 N.C. App. 722, 725, 522 S.E.2d 777, 779 (1999). "Even when a motion for a continuance raises a constitutional issue and is denied, the denial is grounds for a new trial only when a defendant shows that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Hill*, 116 N.C. App. 573, 578, 449 S.E.2d 573, 576, *disc. rev. denied*, 338 N.C. 670, 453 S.E.2d 183 (1994). Here, the defendant has cited no authority and has shown neither that the denial of these two motions (for a continuance and for funds to retain an expert) was an abuse of discretion, nor that his case was thereby prejudiced.

In his motions, defendant contended that either the ammonia acted on the him as a "truth-serum" or it affected his ability to knowingly waive his rights. Defendant's only support for this contention is found in an affidavit and "Supplemental Citation of Authority" his attorney filed with the trial court. According to

the affidavit, "Sizemore attempted to question defendant at 4:05 a.m. Defendant lay on the floor and attempted to sleep, but kept being roused by officers who repeatedly passed a substance in a tube beneath his nose and told him to wake up." Defendant signed a waiver of his rights at 8:25 a.m. and completed his statement with the police at 10:10 a.m. In his "Supplemental Citation" to the trial court, defendant cited *Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770 (1963), in which a heroin addict confessed after a police physician gave him an injection to relieve withdrawal symptoms during interrogation. There, evidence showed that the drug also acted as a truth serum, and the Court held that the confession should have been suppressed. Here, defendant has made no showing that the ammonia caused him to confess, affected his volition, or affected him at all, other than to allege that during questioning he had a "runny nose." Here, however, the trial court found as fact that even when Detective Sizemore spilled some of the ammonia on his own hands, it had "no deleterious effect." In *State v. Mosely*, the Supreme Court noted that

> [t]he "mere hope or suspicion of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of specific necessity for expert assistance." Similarly, undeveloped assertions that the requested expert assistance would be beneficial or even essential to the preparing of an adequate defense are insufficient to satisfy this threshold requirement.

338 N.C. 1, 20-21, 449 S.E.2d 412, 424-25 (1994) (internal citations and quotations omitted), *cert. denied*, 514 U.S. 1091, 131

L. Ed. 2d 738 (1995). We conclude that the trial court neither abused its discretion nor denied defendant his rights. We overrule defendant's second assignment of error.

III

Next, defendant contends that the trial court erred by denying his motion to suppress evidence police seized from his apartment. Before trial, defendant moved to suppress this evidence; the trial court found that the seizure of the items was lawful, and denied his motion. "To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence." *State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Here, defendant did not object during the trial. Accordingly, he has failed to preserve for appeal the issue of admissibility of the evidence. *See id; State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). Thus, the third assignment of error is overruled.

IV

Next defendant assigns error to the trial court's ruling on a question asked by his counsel during *voir dire* of a potential juror. Counsel asked, "[i]f Marc testifies in phase one, you will learn that he has a prior conviction for second degree murder. Insofar as this testimony goes, the Court will instruct you that that may be considered only for the purpose of determining his credibility. Can you follow the judge's instructions about that issue[?]" The trial court found that this was an "improper

stakeout question" and sustained the State's objection. *See State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975) (explaining that "stake out" questions are ones that help attorneys find out what kind of verdict a juror might enter or ones that might "cause him to pledge himself to a future course of action"), *vacated in part, vacated death penalty*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976); *see also State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) (noting that "[c]ounsel should not engage in efforts to indoctrinate, visit with or establish 'rapport' with jurors").

This Court's decision in *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E.2d 920 (1984), *superceded by statute on different grounds,* addresses virtually identical questioning. There, the defendant asked the trial judge if he could ask the following:

> [w]ill I be prohibited from asking the juror whether - well, first of all, will I be prohibited from informing the jury that my client is going to testify and it will come out in evidence that he has a criminal record and if the Court instructs the jurors that may be considered only for the purpose of determining his credibility would it - would they follow the Court's instructions. May I ask such a question?

66 N.C. App. at 394, 310 S.E.2d at 922-23 (emphasis omitted). The trial court refused to allow the question and the defendant raised this issue, among others, on appeal. This Court held that pursuant to N.C. Gen. Stat. § 15A-1214(c) (1978), state case law, and federal case law, the court should have allowed the question. *See Hedgepeth*, 66 N.C. App. at 393-99, 310 S.E.2d at 922-25. In *Hedgepeth*, we found two additional errors in the trial, that "when

considered together [with the jury *voir dire* error], mandate the award of a new trial." *Id.* at 401, 310 S.E.2d at 926.

Defendant bears the burden of showing that had the judge allowed defendant's counsel to ask this question of prospective jurors, there was a reasonable possibility that a different result would have been reached at the trial. *See* N.C.G.S. § 15A-1443(a); *State v. King*, 326 N.C. 662, 392 S.E.2d 609 (1990) (holding that in multiple assignments of error defendant failed to establish that he had been substantially prejudiced). The Court in *Hedgepeth* also noted that the "evidence of defendant's guilt is not overwhelming. Indeed, a first trial ended in a hung jury." 66 N.C. App. at 401, 310 S.E.2d at 926. Here, Defendant has not demonstrated how the erroneous limitation on jury *voir dire* has substantially prejudiced him or "prevented him from receiving a fair and impartial trial." *See King*, 326 N.C. at 673, 392 S.E.2d at 616. Without such a showing, we do not believe that the error requires a new trial. *See* N.C.G.S. § 15A-1443(a). Further, unlike in *Hedgepeth*, the evidence here, including defendant's confession and testimony at trial, overwhelmingly establishes his guilt. According to both parties' evidence, defendant and Williams arrived together at the Cotswold Terrace apartment, they both shot Hendricks, and they put him in the car. Defendant admits that he drove away and ultimately left Hendricks for dead in the warehouse parking lot. In light of this overwhelming evidence, we do not believe there is any reasonable possibility of a different outcome.

V

In his fifth assignment of error, defendant contends that the trial court erred by admitting testimony of Anzella Goodwin concerning a phone call she received from Denise Williams the night of the killing. Williams did not testify. Defendant argues that the trial court erred in determining that this testimony was admissible under two exceptions to the hearsay rule. He also contends that allowing this testimony effectively denied defendant his right to cross-examine Williams, in that Williams never testified. Ms. Goodwin, Williams' niece, testified that Williams called her and "said that Marc had just shot Poochie (Hendricks). Had shot Poochie, and, uh, she said he said he was gonna come back and kill her. She said she was scared and she didn't know what to do." The State alleged that this conversation occurred approximately two hours after the shooting. Goodwin explained that during this phone conversation, Williams was "crying, crying quite a bit, actually. And she was whispering. Her voice was real low, like she was scared, sounded like a little kid."

We first note that at trial the State offered the testimony under Rule 803(1) and 803(2), and the trial court ruled accordingly. *See* N.C. R. Evid. 803(1) & 803(2) (2001). Defendant now argues that the statements did not qualify for either of these exceptions. However, the State argues on appeal that the testimony was properly admitted pursuant to Rule 803(3) ("Then Existing Mental, Emotional, or Physical Condition") and Rule 803(1) ("Present Sense Impression"). We review the admissibility of the statements pursuant to all three of the aforementioned sections of

Rule 803.

Generally, hearsay testimony is not admissible. *See* N.C. R. Evid. 802 (2001). However, pursuant to Rule 803(1) "Present Sense Impression," "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible even though the declarant is available as a witness. N.C. R. Evid. 803(1) (2001). "There is no rigid rule about how long is too long to be 'immediately thereafter.'" *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998) (quoting *State v. Cummings*, 326 N.C. 298, 314, 389 S.E.2d 66, 75 (1990)). In *Clark*, the witness observed her son's behavior, then walked next door to her daughter-in-law's house and told her about it. *See id.* In *Clark*, the Court found that the statements were sufficiently close in time to the events to be considered "immediately thereafter." *Id.*

The Supreme Court has explained that "[[t]he basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997) (citing *State v. Gainey*, 343 N.C. 79, 86, 468 S.E.2d 227, 232 (1996)). In *Pickens*, the declarant witnessed the shooting of a child, rushed outside, and screamed to a nearby police officer that defendant had just shot a child. *See id.* The Court held that the officer's testimony as to what the declarant said was admissible, because the declarant did not have the "time to reflect on his thoughts or

fabricate a story." *Id.* at 645, 488 S.E.2d at 171. Here, Williams had two hours to reflect on the events, thereby increasing the likelihood of "deliberate or conscious misrepresentation." *Id.* at 644, 488 S.E.2d at 171. Unlike in *Clark*, Williams returned home and waited two hours before calling her niece; the record does not reflect what Williams did during this period. *See Clark*, 128 N.C. App. at 725, 496 S.E.2d at 606. We do not believe that under these circumstances, the statement was made "immediately []after" the events, as required by Rule 803(1). Thus, we do not believe the statement was admissible under this hearsay exception.

Pursuant to Rule 803(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is admissible as an "excited utterance" even though the declarant is available to testify. N.C. R. Evid. 803(2) (2001). "In order for a statement to fall within the parameters of the excited utterance exception of Rule 803(2), there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Guice*, 141 N.C. App. 177, 200, 541 S.E.2d 474, 489 (2000) (internal citation and quotations omitted). "While the period of time between the event and the statement is without doubt a relevant factor, the element of time is not always material." *State v. Thomas*, 119 N.C. App. 708, 712, 460 S.E.2d 349, 352, *disc. rev. denied*, 342 N.C. 196, 463 S.E.2d 248 (1995). The court must "consider whether the delay in making the statement provided an opportunity to

manufacture or fabricate the statement." *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985) (citations omitted).

In *State v. Safrit*, the Court held that statements made twenty-five minutes after the charged incident were not admissible under the "excited utterance" exception, because the Court believed "that defendant's statements lacked the spontaneity necessary to show that they were made free from reflection or fabrication." 145 N.C. App. 541, 547, 551 S.E.2d 516, 521 (2001). The same analysis applies here. Williams made her statements to Goodwin two hours after the events. According to Goodwin's testimony, Williams was crying during their conversation and Goodwin testified that Williams' voice was "real low, like she was scared." However, the evidence does not reveal Williams' activities during the interval between the shooting of Hendricks and her conversation with Goodwin. As in *Safrit*, the declarant here, Williams, had sufficient time to fabricate her statements, and certainly had a motive to place the blame for Hendricks' death on defendant, rather than herself. *See Safrit*, 145 N.C. App. at 541, 551 S.E.2d at 521. Accordingly, her statement to Goodwin was not admissible as an excited utterance.

However, we do conclude that Goodwin's testimony, while inadmissible pursuant to Rule 803(1) and (2), is admissible under Rule 803(3) ("Then Existing Mental, Emotional, or Physical Condition") (1999). *See State v. McElrath*, 322 N.C. 1, 15, 366 S.E.2d 442, 450 (1988) (allowing a review of an evidentiary issue when certain testimony was admitted at trial, but under the

incorrect rule of evidence). Testimony is not excluded as hearsay if, according to Rule 803(3), it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health,) but not including a statement of memory or belief to prove the fact remembered or believed . . . ." To help understand this rule, "our courts have created a sort of trichotomy in applying Rule 803(3)." *State v. Lesane*, 137 N.C. App. 234, 240, 528 S.E.2d 37, 42, *disc. rev. denied*, 352 N.C. 154, 544 S.E.2d 236 (2000). "Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception." *Id.*

Here, Goodwin testified to Williams' statement that defendant had "just shot Poochie" and "he said he was gonna come back and kill her," and that she was "scared." The statement that Williams was "scared" describes emotion; her statement that defendant had "just shot Poochie" recites fact. This testimony, including both "emotions and the facts underlying those emotions," was admissible under Rule 803(3). *See Lesane*, 137 N.C. App. at 240, 528 S.E.2d at 42.

VI

In his sixth assignment of error, defendant argues that the trial court abused its discretion when it reopened the jury *voir dire* after the trial was underway, and allowed the State to

peremptorily challenge and remove a juror. *See State v. Locklear*, 145 N.C. App. 447, 551 S.E.2d 196 (2001) (noting that the decision to reopen examination of a juror previously accepted by the parties is in the discretion of the trial court). In *State v. Holden*, 346 N.C. 404, 429, 488 S.E.2d 514, 527 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998), the Court held that the "trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court." In *Holden*, a capital murder case, all of the evidence had been presented when the trial court discovered that a juror had made public remarks against the death penalty. *See id.* at 428, 488 S.E.2d at 527. The court reopened *voir dire* of the juror, but declined to excuse the juror for cause. Consequently, the State exercised a peremptory challenge to remove the juror. *See id.* at 428, 488 S.E.2d at 527.

Here, the juror alerted the trial court that he had a connection to one of the possible witnesses in defendant's case. As in *Holden*, the trial court reopened *voir dire*, and declined to excuse the juror for cause. The State then exercised one of its remaining peremptory challenges to remove the juror. As noted by the Court in *Holden*, "[o]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror." *Id; see also Locklear,* 145 N.C. App. at 451, 551 S.E.2d at 198; *cf.* N.C. Gen. Stat. § 15A-1214(g) (1999) (explaining the process for reopening the examination of a juror, but only before

the jury has been impaneled). The juror's relationship with one of the witnesses raised the possibility that a personal connection to the case could compromise his ability to be fair and just. It was within the court's discretion to reopen the examination of this juror, and defendant has not shown an abuse of that discretion. Assignment of error number six is overruled.

VII

In his seventh assignment of error, defendant contends the trial court committed prejudicial error by failing to instruct the jury on self-defense. "[I]n determining whether to submit an instruction on self-defense, the court must consider the evidence in the light most favorable to the defendant." *State v. Martin*, 131 N.C. App. 38, 44, 506 S.E.2d 260, 264, *disc. rev. denied*, 349 N.C. 532, 526 S.E.2d 473 (1998). An instruction on self-defense is appropriate when the evidence shows "that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm." *State v. Ross*, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994). The defendant's belief must be reasonable under circumstances at the time of the incident. *See State v. Locklear*, 349 N.C. 118, 154, 505 S.E.2d 277, 298 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999); *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977); *Martin*, 131 N.C. App. at 44, 506 S.E.2d at 264. He is not entitled to the instruction if he provoked the victim, and actively participated in the affray. *See State v. Spaulding*, 298 N.C. 149, 154, 257 S.E.2d 391, 394-95 (1979); *State v. Allred*, 129 N.C. App. 232, 235, 498

S.E.2d 204, 206 (1998); *State v. Lovell*, 93 N.C. App. 726, 728, 379 S.E.2d 101, 103 (1989). On appeal, we review this issue to determine, whether, in the light most favorable to the defendant, the evidence supported an instruction on self-defense. *See Ross*, 338 N.C. at 283, 449 S.E.2d at 559-60; *Martin*, 131 N.C. App. at 44, 506 S.E.2d at 264. We hold that it did not.

Here, the evidence indicates that Hendricks was not armed when defendant shot him the first time. However, defendant testified that at the height of the argument in the apartment, Hendricks "bent down, like he was trying to tackle me," and that Hendricks rushed at him. Defendant explained that he had seen Hendricks employ this technique in prison, and knew that it was dangerous. He also testified that he could not see if Hendricks had a knife, but that Hendricks was known to carry one. When Hendricks rushed him, defendant believed that Hendricks was "wanting to hurt me. I had to protect myself." Defendant then "jumped to the side and I just pulled the gun out and I shot him." Taken in the light most favorable to the defendant, the jury could have found that defendant believed it necessary to get out of the way of Hendricks. However, we do not believe that the evidence supported an inference that it was necessary or reasonable for defendant to shoot Hendricks in order to protect himself, or "that he in fact formed a belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm." *Ross,* 338 N.C. at 283, 449 S.E.2d at 560. Accordingly, the trial court's refusal to give this instruction was not error.

In addition "[s]elf-defense . . . is not a defense to first-degree murder under the felony murder theory," although it may be a defense to the underlying felony. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995); *see also State v. Bell*, 338 N.C. 363, 387, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Here, defendant argued only that he was defending himself when he fired the first shot (at Cotswold Terrace). He did not argue that he was defending himself during the later events that constituted the kidnapping. A failure to instruct on self-defense, where, as here, the defendant was convicted of first degree murder on both premeditation and deliberation and felony murder, even if error, is harmless. Thus, defendant's seventh assignment of error is overruled.

VIII

In his eighth assignment of error, defendant contends that the trial court committed prejudicial error by failing to instruct the jury on voluntary manslaughter. The jury was instructed on first degree murder under theories of premeditation and deliberation and felony murder. Our state defines first degree murder as a "willful, deliberate, and premeditated killing" or that "which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony." N.C. Gen. Stat. § 14-17 (1999). "All other kinds of murder . . . shall be deemed murder in the second degree." *Id.* Voluntary manslaughter is a lesser included offense of second degree murder, *see State v. Holcomb*, 295 N.C. 608, 613, 247 S.E.2d

888, 891 (1978), and is defined as intentional killing either in the heat of passion due to adequate provocation or in the exercise of self-defense. *See State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983), *State v. Ferrell*, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980).

Ordinarily, a defendant is entitled to have the jury consider lesser included offenses that are supported by the evidence. *See State v. Price*, 344 N.C. 583, 589, 476 S.E.2d 317, 320 (1996). The lesser included offenses of first degree murder include voluntary manslaughter. *See id.* Defendant presented evidence from which the jury could have found that he shot Hendricks the first time in the heat of an argument. However, even defendant's evidence tended to show that he acted coolly and without adequate provocation. For example, during his testimony defendant said that, "I just pulled out the gun and shot him." Thus, there was insufficient bases in the evidence for an instruction on voluntary manslaughter as a lesser included offense of first degree murder by premeditation and deliberation, and there was no error.

In addition, the jury convicted defendant of first degree murder both by premeditation and deliberation and by felony murder. Defendant admitted to shooting Hendricks at least once and to putting Hendricks in his car and driving him to a different location, where Hendricks was shot again and abandoned. First degree kidnapping is defined as:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over

> without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . .

N.C. Gen. Stat. § 14-39(a) (1999). First degree kidnapping occurs when "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted . . . ." N.C.G.S. § 14-39(b). Here, the jury found the defendant guilty of first degree kidnapping, during which the victim died. Consequently, they found him guilty of first degree felony murder, pursuant to N.C.G.S. § 14-17, which is fully supported by the evidence. The Supreme Court held in *State v. Boone* that once the defendant has been convicted of first degree felony murder, failure to submit voluntary manslaughter to the jury, even if error, is harmless. *See Boone*, 299 N.C. 681, 263 S.E.2d 758 (1980). Defendant's eighth assignment of error is overruled.

IX

In his ninth and last assignment of error, defendant contends that the trial court committed prejudicial error by instructing the jury on acting in concert.

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), *cert.*

denied, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)) (overruling *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), and reinstating the law prior to *Blankenship*). Here, the trial court's instruction to the jury mirrors the language used by the Court in *Barnes*. *See id.*

The State's evidence tended to show that defendant and Williams together went to see Hendricks and together shot him at the Cotswold Terrace apartment. According to the State, the defendant alone took Hendricks in the car to the warehouse parking lot, unloaded Hendricks, shot him again, and left his body on the ground.

Defendant's own evidence supports acting in concert. Defendant admitted shooting the victim the first time, loading the body into Williams' car, and driving away. In his testimony and his statements to police, defendant claimed that when he and Williams loaded Hendricks into the car, they planned to take him to the hospital. On the way, they believed he had stopped breathing, so they unloaded him in the parking lot. Even according to his own evidence, defendant has admitted all of the elements of the kidnapping, as well as firing at least one shot and leaving Hendricks for dead.

In addition, defendant was "actually or constructively" present when Williams allegedly shot the victim in the parking lot "as a natural or probable consequence" of the kidnapping. *See Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. "An instruction on the doctrine

of acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and 'acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.'" *State v. Cody*, 135 N.C. App. 722, 728, 522 S.E.2d 777, 781 (1999) (quoting *State v. Robinson*, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986)). Here, all of the evidence indicates that defendant was present and participating in the commission of these offenses. Although there were differences in the evidence as to the extent of Williams' participation, the evidence supported the inference that he acted with Williams, who defendant alleges committed acts constituting kidnapping and murder. Therefore, we find this instruction was not erroneous and we overrule defendant's ninth assignment of error.

We conclude that defendant's trial contained no prejudicial error requiring a new trial.

No error.

Chief Judge EAGLES and Judge CAMPBELL concur.

Report per Rule 30(e).