NO. COA01-1082

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 00 CRS 16146, 59989

CEDRIC LEON MULDROW

Appeal by defendant from judgments entered 16 January 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 8 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for the State

John T. Hall for defendant-appellant.

TYSON, Judge.

Cedric Leon Muldrow ("defendant") was convicted of second-degree murder, assault with a deadly weapon inflicting serious injury, and possession of a firearm by a felon. Defendant was sentenced to a term of 220 to 273 months imprisonment for the murder conviction, a consecutive term of thirty-four to fifty months imprisonment for the assault conviction, and a consecutive term of fifteen to eighteen months imprisonment for the firearm conviction. Defendant appeals.

Counsel appointed to represent defendant has filed an *Anders*

brief in which he indicates he has been unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal. He asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also filed documentation with the Court showing that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with the Court and providing him with a copy of the documents pertinent to his appeal.

Pursuant to *Anders* and *Kinch*, we must determine from a full examination of all the proceedings whether the appeal has merit. On 28 January 2002, defendant filed thorough written arguments containing extensive citations to case authorities with this Court. Defendant argues that: (1) the short form indictment for murder was invalid; (2) there was insufficient evidence to support the charges of assault with a deadly weapon inflicting serious injury and murder; (3) the trial court committed plain error by failing to charge the jury on misdemeanor aggravated assault inflicting serious injury; and (4) the trial court committed plain error by failing to charge the jury on involuntary manslaughter. Defendant argues that he should be awarded a new trial.

As to defendant's first argument, we find no error. The validity and use of the short form murder indictment has been repeatedly upheld. *See State v. Smith*, 352 N.C. 531, 539, 532 S.E.2d 773, 779 (2000) ("We reiterate here that indictments based

on N.C.G.S. § 15-144, like those charging defendant in this case, comply with both the North Carolina and the United States Constitutions."), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d. 360 (2001).

Second, defendant argues that the trial court erred by denying his motions to dismiss for insufficiency of the evidence. "In ruling on the motion to dismiss, the trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997) (citing *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995)). "The trial court need not concern itself with the weight of the evidence." *Id.* at 717, 483 S.E.2d at 434-35. "'[I]t is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty.'" *Id.* (quoting *State v. Murphy*, 342 N.C. 813, 819, 467 S.E.2d 428, 432 (1996)). In the present case, testimony tended to show that defendant possessed a gun at the scene of the shooting; that defendant threatened to kill the decedent just before decedent entered the room where defendant was located; that defendant was the only person in the room with the decedent; and decedent was shot once in the leg and once in the head. Defendant did not deny shooting the decedent, but argued self-defense. Reviewed in the light most favorable to the State, we conclude there was sufficient evidence to support the verdicts. This assignment of error is

overruled.

Third, defendant argues that the trial court should have instructed on misdemeanor aggravated assault pursuant to G.S. 14-33(c)(1). We disagree. This Court has stated:

> The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor.

State v. Owens, 65 N.C. App. 107, 110-11, 308 S.E.2d 494, 498 (1983)(emphasis in original). There was no dispute that both a deadly weapon was used and that the victim suffered a serious injury since the victim was shot in the leg. We hold the trial court did not err by refusing to instruct the jury on misdemeanor assault.

Fourth, defendant argues that the trial court should have instructed the jury on involuntary manslaughter because he contends the victim was shot while in a struggle over the gun when the victim tried to rob the defendant. Because defendant did not request an instruction on involuntary manslaughter, he must show plain error. N.C.R. App. P. 10(b)(3), (4) (1999); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

"Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable

negligence." *State v. Wrenn*, 279 N.C. 676, 687, 185 S.E.2d 129, 136 (1971) (citing *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963)) (emphasis omitted). Here, defendant testified that he purposefully carried the gun into the adjoining room after the victim was shot in the leg because he felt as though the victim "could have beat [him] with his hands." Defendant further testified that he shot the victim in self-defense when the victim raised a golf club. This is an intentional act and does not support an instruction on involuntary manslaughter. This assignment of error is overruled.

No error.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).