NO. COA08-1558

NORTH CAROLINA COURT OF APPEALS

Filed: 21 July 2009

STATE OF NORTH CAROLINA

v. Guilford County
No. 05CRS065886

LEONZO LENCHETO WHITE

Appeal by Defendant from judgment entered 11 September 2007 by Judge William Z. Wood, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 19 May 2009.

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

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant.

WYNN, Judge.

Defendant Leonzo Lencheto White appeals from the trial court's judgments entered on jury verdicts finding him guilty of first-degree murder and attempted first-degree murder. After carefully reviewing the record, we find no error.

The State's evidence tended to show that Defendant, his brother Harry White, and Tobin DeJournette were acquaintances of brothers John and Marlon Goodwin (collectively "the Goodwins"), alleged drug dealers in the Salisbury and High Point, North

Carolina areas.

On 6 January 2005, Kevin Chunn, an alleged lower-level drug dealer, helped arrange a cocaine transaction between the Goodwins and Kentrell Coleman. The Goodwins and Defendant met Coleman at an O'Charley's restaurant in Salisbury that night. The men discussed a sale of cocaine and agreed to consummate the deal later that evening in High Point.

Sometime after leaving the restaurant, Coleman called Defendant for directions to their meeting place in High Point. Defendant instructed Coleman to meet them at a "Race Track" gas station. There, Coleman found the Goodwins, Defendant and DeJournette riding together in the same car. Coleman's passengers were Alecia Herndon, Jeremiah Rushton, and Manuela Medlin. Coleman followed the Goodwins, Defendant and DeJournette to 214 Morgan Place in High Point.

Harry White and his cousin Roger White split the rent at 214 Morgan Place. When Coleman arrived at that address, he found Defendant standing in the doorway. Coleman entered the house with Herndon, who held $4,000 of Coleman's money for the transaction. Coleman possessed a .38 revolver. Defendant locked the door behind Coleman and Herndon when they entered, and they joined Defendant, the Goodwins and DeJournette in the kitchen.

Thereafter, Marlon Goodwin left the room momentarily and brandished a pistol when he returned. Coleman testified that Marlon Goodwin was "taunting" with the pistol, indicating that he

had Coleman cornered. Coleman stated that "they just started shooting," and he pulled out his revolver in response; a barrage of gunfire followed. However, DeJournette thought Coleman fired the first shot.

Coleman also stated that John Goodwin, Tobin DeJournette, and Defendant fired guns in their possession. Specifically, Coleman alleged that he saw Defendant with a black revolver. Harry White's testimony partially corroborated this part of Coleman's testimony, stating that John Goodwin had an AK-47-type assault rifle and DeJournette had a "shiny pistol."[1] However, White denied ever seeing a gun in Defendant's possession.

In the initial exchange of gunfire, Coleman emptied his five-shot revolver and believed he was shot three times, but he did not lose consciousness. He saw Herndon shot multiple times; her wounds were fatal. After the initial shooting ended, the Goodwins, DeJournette, and Defendant scrambled to exit the house through a bedroom window. Meanwhile, Coleman crawled on the floor searching for his cell phone. Seconds after Coleman located his phone and attempted to place a call, Defendant returned, hit Coleman in the head with the pistol, shot Coleman twice more in his back and the back of his leg, and told Coleman to die. Coleman survived.

Defendant was tried before a jury for first-degree murder of Herndon and attempted first-degree murder of Coleman. The State dismissed a robbery with a dangerous weapon charge prior to trial.

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[1] Later in his trial testimony, DeJournette admitted possessing a shotgun.

The jury convicted Defendant of first-degree murder, pursuant to the felony-murder rule, and attempted first-degree murder. The trial court sentenced Defendant to life imprisonment without parole for the first-degree murder conviction, and a concurrent sentence of 201 to 251 months' imprisonment for the attempted first-degree murder conviction.

Defendant appeals, arguing the trial court: (I) committed plain error when it limited its jury instructions on acting-in-concert to first-degree murder and attempted first-degree murder, allowing the jury to believe that the acting-in-concert theory is not applicable to the lesser included offenses; (II) erred by allowing improper closing argument by the prosecutor; and (III) committed plain error by failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter.

I.

In his first argument, Defendant contends that the trial court committed plain error because it limited its substantive instruction on acting-in-concert to first-degree murder and attempted first-degree murder, suggesting to the jury that acting-in-concert did not apply to the lesser-included offenses. We disagree.

This Court will not find that the failure to give an instruction amounted to plain error unless the jury probably would have reached a different verdict had the instruction been given. *State v. Morgan*, 315 N.C. 626, 645, 340 S.E.2d 84, 96 (1986). "[E]ven when the 'plain error' rule is applied, '[i]t is the rare

case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Lawson*, __ N.C. App. __, __, 669 S.E.2d 768, 775 (2008) (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79).

In this case, toward the beginning of its entire instruction, the trial court gave this substantive charge on acting-in-concert:

> Now, ladies and gentlemen, for a person to be guilty of a crime, it is not necessary that he personally do all the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit first-degree murder or attempted first-degree murder or assault with a deadly weapon inflicting serious injury, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit first-degree murder or attempted first-degree murder or assault with a deadly weapon inflicting serious injury or as a natural or probable consequence therefrom.

Thus, as Defendant correctly points out, the trial court omitted the lesser-included offenses of second-degree murder and voluntary manslaughter from its initial instruction on acting-in-concert. Defendant contends that this omission amounted to plain error because it potentially misled the jury into believing that the

acting-in-concert theory is not applicable to the lesser-included offenses.

We observe that the trial court's substantive instruction on acting-in-concert was incomplete in that it did not expressly include the lesser-included offenses, but the instruction was not erroneous because it did not suggest, explicitly or implicitly, that acting-in-concert could not apply to lesser included offenses. Moreover, Defendant's argument ignores that the trial court later applied the acting-in-concert language to its substantive instructions on the lesser-included offenses. The trial court gave this instruction on second-degree murder:

> In order for you to find the defendant guilty of second-degree murder, the State must prove from the evidence beyond a reasonable doubt that the defendant acting either alone or acting together with others or someone with whom the defendant was acting in concert intentionally and with malice wounded the victim, Alicia Herndon, with a deadly weapon thereby proximately causing her death.

Likewise, the trial court gave the following instruction on voluntary manslaughter:

> So, ladies and gentlemen, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, either acting alone or acting together with someone with whom the defendant was acting in concert, intentionally wounded the victim, Ms. Alicia Herndon, with a deadly weapon thereby causing her death but the State has failed to satisfy you beyond a reasonable doubt that the defendant or someone with whom he was acting in concert did not act in the heat of passion upon adequate provocation, then it would be your duty to return a verdict of guilty of voluntary manslaughter.

The trial court also included acting-in-concert language in its

substantive instruction on attempted first-degree murder.

Defendant generally cites cases stating that an erroneous instruction is not cured by an earlier or later correct instruction, or that it is reversible error for the trial court to omit a defense from the mandate. *See State v. Cousins*, 289 N.C. 540, 549, 223 S.E.2d 338, 344 (1976) ("when the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part, and this is particularly so when the incorrect portion of the charge is contained in the application of the law to the facts."); *State v. Dooley*, 285 N.C. 158, 165-66, 203 S.E.2d 815, 820 (1974) (trial judge reversibly erred by failing to include not guilty by reason of self-defense as a possible verdict in the final mandate, even though the judge gave an earlier accurate instruction on self-defense, because jury could have believed that was not a permissible verdict); *State v. Davis*, 177 N.C. App. 98, 101, 627 S.E.2d 474, 477 (2006) (same). We find each of these cases distinguishable because the portion of the trial court's substantive instruction on acting-in-concert in this case came near the beginning of the charge, not in the mandate, and was incomplete, not erroneous.

A jury instruction must be construed contextually, and if "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." *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (1996)

(citations omitted). Construing the entire context of the trial court's jury instructions in this case, we conclude that the jury was fairly and clearly informed that the acting-in-concert theory applied to the lesser included offenses. Accordingly, we find no error in the trial court's jury instructions and overrule this assignment of error.

II.

In his next argument, Defendant contends that the trial court erred by allowing the prosecutor to argue, over his objection, that the jury could not consider self-defense.

Prosecutors generally have wide latitude in the scope of their closing arguments, but they

> may not become abusive, inject . . . personal experiences, express . . . personal belief[s] as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230 (2007); *see also State v. Flowers*, 347 N.C. 1, 36-37, 489 S.E.2d 391, 411-12 (1997). The latitude the trial court gives prosecutors during their closing arguments is reviewable by this Court for an abuse of discretion. *State v. Brooks*, 113 N.C. App. 451, 458-59, 439 S.E.2d 234, 238 (1994) (citing *State v. Sanders*, 327 N.C. 319, 342, 395 S.E.2d 412, 427 (1990)).

During the charge conference in this case, prior to closing arguments and jury instructions, defense counsel and the prosecutor conferred with the trial judge regarding theories of the case that

could be argued and should be instructed on. Defense counsel agreed with the prosecutor in open court that an instruction on self-defense was not warranted. Nonetheless, Defendant now argues that the prosecutor's argument relating to self-defense was improper. The prosecutor argued:

> Now, I'll ask you to ignore the fact that Kentrell Coleman would have to be one of the stupidest people on the planet to want to shoot when he's got four people in front of him or three people in front of him with guns. Let's say that that happened. Is it self-defense–and I'll talk more about self-defense in a minute–but let's say you and I are both armed. I pull my gun on you. You then pull a gun and fire at me. I shoot to kill you. That's murder ladies and gentlemen. There's no self-defense here. You're going to be instructed on the law in the State of North Carolina that applies to this case. And you know what? There's instruction after instruction on self-defense. You know what? You're not going to hear anything about self-defense in these instructions. And why is that? Because self-defense doesn't play a part in this case. You're not to consider that because you're not instructed on it. That's why you never heard those words out of defense counsel's mouth during this case. If you needed to consider self-defense at all, Judge Wood would instruct you on self-defense.

Thereafter, the trial court overruled defense counsel's objection.

Specifically, Defendant argues that "the challenged argument was improper because it urged the jury to ignore evidence that Kentrell Coleman fired the first shots, or at least drew his gun first, which would be some evidence of provocation. Even in the absence of a claim of self-defense, the jury could consider this evidence in deciding if the State proved premeditation, deliberation, and malice beyond a reasonable doubt."

Defendant's argument is not persuasive. First, the prosecutor did not state that the jury should not consider evidence; the prosecutor illustratively argued that self-defense was not an applicable theory to the case- a fact to which defense counsel had already agreed.

Second, the prosecutor's argument could not have affected the jury's consideration of provocation because that concept is distinct from self-defense, and the trial court fully instructed on provocation in connection with voluntary manslaughter. *Compare State v. Rainey*, 154 N.C. App. 282, 289, 574 S.E.2d 25, 29-30 (discussing the concept of "adequate provocation" to mitigate a killing to voluntary manslaughter), *disc. review denied*, 356 N.C. 621, 575 S.E.2d 520 (2002); *with State v. Revels*, __ N.C. App. __, __, 673 S.E.2d 677, 680-81 (2009) (discussing perfect and imperfect self-defense) (citations omitted). Accordingly, we conclude that the trial court did not abuse its discretion and overrule this assignment of error.

III.

Lastly, Defendant argues the trial court committed plain error by failing to instruct on the lesser-included offense of attempted voluntary manslaughter. We disagree.

A defendant is entitled to have a lesser-included offense submitted to the jury. *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000) (quoting *State v. Brown*, 300 N.C. 731, 735-36, 268 S.E.2d 201, 204 (1980)). However, a "trial judge is not required to instruct the jury on lesser-included offenses" unless

there is "evidence to sustain a verdict of defendant's guilt of such lesser degrees." *State v. Lea*, 126 N.C. App. 440, 447, 485 S.E.2d 874, 878 (1997). "[T]o support an instruction on attempted voluntary manslaughter, a defendant must produce 'heat of passion' or 'provocation' evidence negating the elements of malice, premeditation, or deliberation." *Rainey*, 154 N.C. App. at 290, 574 S.E.2d at 30. "The doctrine of heat of passion is 'meant to reduce murder to manslaughter when defendant kills without premeditation and without malice, but rather under the influence of the heat of passion suddenly aroused which renders the mind temporarily incapable of cool reflection.'" *Id.* (citing *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994)). Attempted voluntary manslaughter is a lesser included offense of attempted first-degree murder. *Id.*

The evidence in this case did not support an instruction on attempted voluntary manslaughter. The evidence is uncontroverted that either Defendant, or someone with whom he was acting in concert, returned after the initial exchange of gunfire and shot Coleman twice more. Multiple witnesses testified that the additional shots occurred seconds after the initial melee. Therefore, even assuming that Defendant, or anyone with whom he was acting in concert, initially shot Coleman under the influence of adequate provocation, the act of leaving and returning to shoot Coleman twice more provided an adequate cooling period and destroyed the provocation. Accordingly, the evidence did not support an instruction on attempted voluntary manslaughter and this

assignment of error is overruled.

No error.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).