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NO. COA08-309

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

STATE OF NORTH CAROLINA

v.

New Hanover County
No. 05 CRS 55982

JASON GARY

Appeal by Defendant from judgment entered 7 November 2007 by Judge D. Jack Hooks, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 11 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

Thomas R. Sallenger for Defendant.

Slip Opinion

STEPHENS, Judge.

In this case, Defendant contends that the trial court erred in: (1) denying Defendant's motion to dismiss the charge of first-degree murder due to insufficient evidence, and (2) refusing Defendant's request for a special jury instruction. We disagree with Defendant's contentions and conclude that Defendant received a fair trial, free of error.

Facts

The State's evidence at trial tended to show that in February 2005, two men named "Real Black" and "Elk" robbed Defendant. About two months later, around 10:45 p.m. on 9 April 2005, Defendant and

his childhood friend, Shamarr Brown, were driving around Wilmington in a car when they encountered Real Black and Elk driving around in a truck. When the truck stopped in front of the car at a traffic signal, Shamarr Brown got out, ran in front of the car, and began shooting at the truck. Defendant began shooting at the truck through the car's sunroof. Real Black testified that no one in the truck fired any shots at the car. A single bullet struck and killed Shamarr Brown.

Defendant was indicted on the charge of first-degree murder, but the jury found Defendant guilty of voluntary manslaughter. In a judgment entered 7 November 2007, the trial court imposed a prison sentence of 103 to 133 months. Defendant appeals.

Analysis

Defendant set out seven assignments of error in the record on appeal, but brought only two assignments of error forward in his brief. The assignments of error set out in the record on appeal but not argued in Defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6).

I

By his first assignment of error, Defendant contends that the trial court erred in denying Defendant's motion to dismiss due to insufficient evidence. Defendant argues that it "seems illogical to believe from the evidence presented that it was this Defendant who fired the shot that killed his own friend." We disagree.

A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense

charged or of a lesser-included offense therein, and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 573 S.E.2d 866 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* On review of a denial of a motion to dismiss, this Court views the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* Contradictions and discrepancies do not warrant dismissal of the case, but rather are for the jury to resolve. *Id.*

Voluntary manslaughter is a lesser-included offense of first-degree murder, *State v. Price*, 344 N.C. 583, 476 S.E.2d 317 (1996), and "is defined as the unlawful killing of a human being without malice, either express or implied[.]" *State v. Barden*, 356 N.C. 316, 361, 572 S.E.2d 108, 136 (2002) (citation omitted).

In this case, the State produced substantial evidence that Defendant fired the shot that killed Shamarr Brown. That evidence included, but was not limited to, the following: (1) an eyewitness's testimony that she saw Shamarr Brown standing in front of the car shooting at the truck, that she did not see or hear any shots fired from the truck, and that she saw Shamarr Brown fall toward the truck; (2) Real Black's testimony that no one in the truck fired any shots at the car; (3) Defendant's girlfriend's testimony that, after the shooting, Defendant told her that he and Shamarr Brown had gotten the jump on Real Black and Elk, that he had been firing through the car's sunroof, that Shamarr Brown had gotten shot, and that he threw his gun into a pond; (4) a gun

found in a pond near the scene of the shooting; (5) shell casings recovered from the top of the trunk and the sunroof area of the car which were fired from the gun found in the pond; and (6) a pathologist's testimony that Shamarr Brown was killed by a single bullet that entered his left temple, moved slightly downward and forward, and exited his right eye. At a minimum, this evidence creates a reasonable inference from which the jury could conclude that Defendant, located behind and to the left of Shamarr Brown and firing in his direction, fired the shot that entered Shamarr Brown's left temple and killed him. Defendant's assignment of error is overruled.

II

By his second assignment of error, Defendant argues that the trial court committed reversible error by refusing Defendant's request for a special jury instruction. Again, we disagree.

Our Supreme Court has held that "the trial court is not required to give the exact instructions requested by a defendant." *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004) (citing *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976)). "Instead, requested instructions need only be given in substance if correct in law and supported by the evidence." *Id.* (citing *State v. Bell*, 338 N.C. 363, 391, 450 S.E.2d 710, 726 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995)).

During the charge conference, Defendant asked the trial court to instruct the jury as follows:

In any charge regarding murder or manslaughter that the jury be specifically

instructed that, quote, "the State must prove beyond a reasonable doubt that a bullet fired by [Defendant] was the proximate cause of Shamarr Brown's death."

In the alternative, that the Court include this requirement in the proximate cause portion of any count. For example, in 206.15, quote, "Third, the State must prove beyond a reasonable doubt that a bullet fired by [Defendant] was the proximate cause of Shamarr Brown's death."

The trial court denied Defendant's request. As to the crime of first-degree murder, the trial court instructed the jury, in part, as follows:

The six things which the State must prove to you beyond a reasonable doubt for you to find [Defendant] guilty of first[-]degree murder on the basis of malice, premeditation, and deliberation are as follows:

Number one, that [Defendant] intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will, or spite, as it is ordinarily understood. Certainly, that's malice, but it also means the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in his death without just cause, excuse, or justification.

. . . .

Second, the State must prove that [Defendant's] act was a proximate cause of the victim's death. A proximate cause is a real cause, that is, a cause without which the victim's death would not have occurred.

As to the crime of voluntary manslaughter, the trial court instructed the jury, in part, as follows:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date [Defendant] intentionally wounded the victim with a deadly weapon, and thereby proximately caused the victim's death, and

that [Defendant] was the aggressor in bringing on the fight or that he used excessive force, then it would be your duty to find [Defendant] guilty of voluntary manslaughter, even if the State has failed to prove that [Defendant] did not act in self-defense. Or, if you find from the evidence beyond a reasonable doubt that on or about the alleged date [Defendant] intentionally and not in self-defense wounded the victim with a deadly weapon and thereby proximately caused the victim's death, but the State has failed to satisfy you beyond a reasonable doubt that [Defendant] did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

Thus, while the trial court did not give the exact instruction requested by Defendant, the trial court gave the requested instruction in substance. The trial court's instructions clearly charged the jury that it could not convict Defendant of either murder or voluntary manslaughter unless the jury found that Defendant fired the shot that killed Shamarr Brown. Accordingly, Defendant's second assignment of error is overruled.

NO ERROR.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).