NO. COA09-1434

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v. Wake County
No. 07 CRS 88892

WALLACE REYNOLD BASS, JR.,
Defendant.

Appeal by defendant from judgment entered 13 November 2008 by Judge J. B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

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

GEER, Judge.

Defendant Wallace Reynold Bass, Jr. appeals his conviction for second degree murder. On appeal, defendant argues that the trial court erred by: (1) denying his request for a voluntary manslaughter instruction and (2) coercing the jury into rendering a verdict. Because the record does not contain evidence from which a jury could conclude that defendant acted in the heat of passion or imperfect self defense, the trial court properly refused to instruct the jury on voluntary manslaughter. Furthermore, although defendant contends that the trial court gave coercive jury

instructions, defendant has failed to demonstrate that any such error rose to the level of plain error given that (1) there was overwhelming evidence that defendant killed the victim and (2) defendant was convicted of second degree murder rather than the greater offense of first degree murder. We, therefore, find no error.

Facts

At trial, the State's evidence tended to show the following facts. At approximately 1:45 a.m. on 28 December 2007, at a Raleigh club called West Side Story, Daniel Smith was dancing with others as if in a "moshpit" when he accidentally knocked a beer out of defendant's hand. Calvin Evans, a bouncer, saw defendant give Smith a "look of aggression like — like what's wrong with you, like why would you do that." Evans then stepped between the two men until he was satisfied that everything was "all right."

Smith resumed dancing, "hopping around the club like he normally do, [sic] having a good time." At approximately 2:00 a.m., it was announced that the club was closing for the night. Smith went into the bathroom at about 2:15 a.m. Defendant followed "right behind him," entering the bathroom just after the door closed behind Smith. Just 30 seconds later, defendant came out of the bathroom "panting, moving fast" and tucking a knife into his sleeve. Evans and Russell Morton, another bouncer, saw defendant with the knife and disarmed him. On cross-examination, defendant admitted that he had managed to sneak the knife into the club by hiding it in his boot. According to defendant, once he was past

security — and as soon as he got to the bar and got his first drink — he moved the knife to his pocket.

Around the time defendant was being disarmed, someone in the club screamed, "'[T]his guy's gotten stabbed.'" Smith had emerged from the bathroom with multiple stab wounds and a shoulder "drenched" in blood. He "squared up" like a boxer, but after taking a few steps, he fell. He was gasping for air and had already lost a lot of blood by the time EMS arrived and transported him to the hospital.

Meanwhile, another of the club's employees, Andrew Goff, went into the bathroom and noticed "a large amount of blood on the floor, large amounts of splattering on the walls and door. And there was also some human flesh pieces on the sink and also on the floor." The blood reached "all the way up into the corners of the ceiling. It was very widespread throughout the bathroom." Running from the three-foot-wide pool of blood on the floor was a "foot-wide path of blood, fairly thick . . . all the way out to where [Smith] was resting in the hall."

The bouncers took defendant outside the club and handcuffed him with the help of an off-duty police officer. Morton and Evans testified, respectively, that when Morton asked defendant why he stabbed Smith, defendant "repeat[ed] something about he wasted my drink" and said "'he was fucking with me.'"

Smith died from his wounds that morning. His autopsy showed that he had four sharp-force injuries: two incised wounds (superficial sharp-force wounds that are longer on the surface than

they are deep) and two stab wounds (wounds that go deeper into the body than their length on the surface). The two incised wounds were both to the front left arm, just above and below the elbow. One of the stab wounds was to the right upper arm, and the other stab wound was to the left front chest. The stab wound to the chest pierced the lung and heart and was the fatal wound.

Later that morning, Detective Bobby LaTour of the Raleigh Police Department interviewed defendant. Defendant waived his *Miranda* rights and told Detective LaTour that after Smith knocked the beer out of his hand, Smith stomped on the beer, took off his shirt, and danced right in front of defendant as if he were "'boasting.'" Defendant told Detective LaTour that he tried to let it go but he was still mad: "'You trying [sic] to get away from somebody, but aint [sic] nowhere to go, because it's a small club.'"

Defendant also told Detective LaTour that about 30 minutes after the beer incident, he went into the bathroom to talk to Smith. Defendant said that once in the bathroom, he told Smith that "'he didn't have to handle it like that,'" but Smith acted like "'so what'" and "'walked up on'" him. Defendant swung and hit Smith in the jaw, knocking him down. Defendant reported that he struck Smith because he "'wasn't going to get stuffed out in no bathroom'" and he was thinking "'aint [sic] no telling what [Smith] might have tried to do to [him] in that bathroom.'" Smith got back up and "'almost got [defendant] to the ground.'" Defendant then took his knife from his pocket and stabbed Smith. Defendant told

Detective LaTour that he thought he only stabbed Smith one time but "'no telling how many times'" he stabbed him. The "'main thing'" was that he "'wanted to get [Smith] off of [him].'"

On 28 January 2008, defendant was indicted for Smith's murder. At trial, defendant testified on his own behalf, describing the events as follows. Defendant went to West Side Story at about 1:30 a.m. on 28 December 2007 to celebrate his birthday with his two friends, Daniel Campbell and Le'ron Gordon. Once inside, defendant had taken a couple sips of his beer when Smith knocked it out of defendant's hand. Smith then stomped on the bottle, took off one of his shirts, and danced "real wild" in front of defendant. Defendant asked Smith "if he wasn't going to at least apologize or buy [defendant] another beer, could he not dance in front of [defendant]." Smith did not respond but "kept on going." At that point, defendant testified, he "was mad, but [he] wasn't angry with" Smith.

Defendant claimed that he did not follow Smith into the bathroom or know he was there, but when he found Smith in the bathroom, he asked Smith if he really needed to act like he did. Defendant wanted to settle things before turning his back on Smith to use the bathroom. Defendant testified that Smith then "set back for a little while and look [sic] like he was thinking about it. I kind of thought like he was caring about it, but then he walked up on me and when he did, he swole up like he was about to advance on me."

When Smith was within one foot of defendant, defendant struck him in the jaw. Smith, who was approximately 5'8" and 175 pounds, and defendant, who was 5'4" and weighed 126 pounds at the time, began "tussling." Smith held onto defendant's sleeves and was "applying pressure," "trying to still fight [him] to the ground," but Smith did not hit defendant. Smith almost had defendant to the ground when defendant got his knife and stabbed Smith. Defendant testified that he thought Smith was about to do "physical body harm" to him and he felt he needed the knife for protection. Defendant said he stabbed Smith to get Smith off of him. After the initial stab, they separated and defendant heard Smith say, "'So you going to stab me.'" The two began to wrestle again and Smith was sliced with the knife a few more times.

Defendant's friends Campbell and Gordon, who had both known defendant for 14 years, testified on his behalf as well. Campbell testified that when Smith knocked the beer out of defendant's hand, the two men had "a few words," but Campbell was not close enough to hear what was said. Smith stomped on the beer bottle, breaking it on his second try. Smith then removed his shirt and started jumping up and down near defendant. After the initial incident, defendant and Smith spoke twice more in a "peaceful" manner. According to Campbell, "After that, everything seemed mutual. It didn't seem like anything escalated after that."

As the group got ready to leave, defendant told Campbell that he needed to use the restroom. "[I]n the blink of an eye," Campbell saw the bathroom door swing open and saw defendant on the

ground. Campbell claimed that defendant got up and stumbled backward out of the bathroom, at which point Smith came "storming out the bathroom." Campbell testified that Smith then stumbled against a chair, took off his shirt, and "proceeded to square up on [defendant] and proceeded to come towards [defendant]. . . . Square up in a boxing stance." On cross-examination, Campbell admitted that he had previously been convicted of carrying a firearm on school property as well as of possession with intent to sell and deliver marijuana.

Gordon testified that after the beer incident, defendant and Smith "just talked about it here to there, you know. . . . they just kind of exchanged words." Then Smith stomped on and broke the bottle and "took off his shirt and just started dancing wild, just all kind of crazy" near defendant. Later, defendant told them that he needed to use the bathroom, and, shortly afterwards, Gordon saw defendant come stumbling backwards out of the bathroom. Gordon claimed that Smith then came out of the bathroom, removed his shirt, and then got "in a boxer stance" and approached defendant. On cross-examination, Gordon admitted that he had previously told the prosecutor that he wanted to help defendant "[a]ny way I can."

Following the presentation of evidence, the trial court instructed the jury on first degree murder and the lesser included offense of second degree murder. The trial court denied defendant's request for jury instructions on the lesser included offense of voluntary manslaughter, the defense of self defense, and the defense of imperfect self defense. On 13 November 2008, the

jury found defendant guilty of second degree murder. The court sentenced defendant to a presumptive-range term of 220 to 273 months imprisonment. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court erred in denying his request for a voluntary manslaughter instruction. "In order to receive an instruction on voluntary manslaughter, there must be evidence tending to show '[a] killing [was] committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense[.]'" *State v. Vincent*, 195 N.C. App. 761, 765, 673 S.E.2d 874, 876 (2009) (quoting *State v. Huggins*, 338 N.C. 494, 497, 450 S.E.2d 479, 481 (1994)). Defendant argues that there was evidence to support both theories.

In order for defendant to have been entitled to a voluntary manslaughter instruction based on the heat of passion theory, there must have been some evidence produced at trial of all the elements of heat of passion or sudden provocation: (1) that defendant stabbed Smith in the heat of a passion, (2) that this passion was provoked by acts of Smith which the law regards as adequate provocation, and (3) that the stabbing took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled. *State v. Robbins*, 309 N.C. 771, 777-78, 309 S.E.2d 188, 192 (1983). The necessary passion has been described as "'any of the emotions of the mind known as rage,

anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection.'" *Huggins*, 338 N.C. at 498-99, 450 S.E.2d at 482 (quoting *State v. Jones*, 299 N.C. 103, 109, 261 S.E.2d 1, 6 (1979), *overruled on other grounds by State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992)). Defendant argues that there was "provocation when Smith spilled [defendant's] beer, taunted him, and then advanced on him in the restroom."

Defendant's argument that the evidence regarding the confrontation on the dance floor supported the heat of passion theory is without merit. Our appellate courts have explained that the heat of passion generally must arise "'sudden[ly],'" *State v. Simonovich*, ___ N.C. App. ___, ___, 688 S.E.2d 67, 71 (2010) (quoting *State v. Woodard*, 324 N.C. 227, 232, 376 S.E.2d 753, 756 (1989)), or "immediately after the provocation," *State v. Tidwell*, 323 N.C. 668, 673-74, 374 S.E.2d 577, 580 (1989). Here, the confrontation on the dance floor occurred approximately 30 minutes before the stabbing. We cannot conclude that this confrontation would have rendered a person of average mind "'incapable of cool reflection'" 30 minutes later. *Huggins*, 338 N.C. at 499, 450 S.E.2d at 482 (quoting *Jones*, 299 N.C. at 109, 261 S.E.2d at 6).

In any event, the confrontation on the dance floor did not rise to the level of adequate provocation. "Provocation which will justify an instruction on manslaughter 'must be more than mere words; as language, however abusive, neither excuses nor mitigates the killing[.]'" *Simonovich*, ___ N.C. App. at ___, 688 S.E.2d at 71 (quoting *State v. Watson*, 287 N.C. 147, 154, 214 S.E.2d 85, 90

(1975)). For this reason, verbal "teasing" does not rise to the level of adequate provocation. *See State v. Rogers*, 323 N.C. 658, 667, 374 S.E.2d 852, 858 (1989) (holding that victims' teasing about drug use was not adequate provocation). *See also Simonovich*, ___ N.C. App. at ___, 688 S.E.2d at 71-72 (holding wife's sexual "taunting" of defendant was not adequate provocation); *State v. McCray*, 312 N.C. 519, 534, 324 S.E.2d 606, 616 (1985) (holding victim's "taunts" about defendant's prison status were not sufficient provocation to raise sudden heat of passion). Even as described by defendant, Smith's conduct on the dance floor amounted to taunting insufficient to support a claim that the killing was committed in the heat of passion.

With respect to what happened later in the bathroom, we also conclude that Smith's "walking up on" defendant, even if in a threatening fashion, does not amount to provocation for purposes of the heat of passion theory. Defendant's evidence showed that Smith's most provocative act in the bathroom was that he "walked up on," "swole up," or "bowed up" on defendant, approaching within a foot of defendant. "[B]owing up" or "walking up on" someone is not adequate provocation to incite a sudden heat of passion. *See Huggins*, 338 N.C. at 498-99, 450 S.E.2d at 482 (holding that taking a few steps toward defendant and using obscenities not adequate provocation). Moreover, the evidence also showed that the confrontation in the bathroom began with defendant speaking to Smith and then punching Smith.

We note that although defendant repeatedly relies on *State v. Camacho*, 337 N.C. 224, 446 S.E.2d 8 (1994), in asserting that the trial court failed to view the evidence in the light most favorable to him, *Camacho* is distinguishable from this case. The evidence in *Camacho* — that the defendant "became enraged after seeing the victim with another man and after being attacked by the victim with a knife" — demonstrated sudden provocation and heat of passion amply supporting a voluntary manslaughter instruction. *Id.* at 233-34, 446 S.E.2d at 13.

We reiterate the principle that "'[t]he law extends its indulgence to a transport of passion *justly* excited and to acts done *before reason has time to subdue it*; the law does not indulge revenge or malice, no matter how great the injury or grave the insult which first gave it origin.'" *Simonovich*, ___ N.C. App. at ___, 688 S.E.2d at 71 (emphasis added) (quoting *State v. Ward*, 286 N.C. 304, 313, 210 S.E.2d 407, 414 (1974), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1207, 96 S. Ct. 3206 (1976)). Neither Smith's spilling of defendant's beer, his dancing wildly in front of defendant, nor his advancing on defendant in the bathroom was provocation sufficient to justify instructing on heat of passion.

Next, we turn to the imperfect self defense theory. "For defendant to be entitled to an instruction on . . . imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. In addition, defendant's belief must be

'reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.'" *State v. Ross*, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (internal citation omitted) (quoting *State v. McKoy*, 332 N.C. 639, 644, 422 S.E.2d 713, 716 (1992)).

Here, the record contains no evidence that defendant actually believed it was necessary to kill Smith. He did not suggest in either his statement to Detective LaTour or in his own testimony that he believed he needed to kill Smith. In the statement, defendant told the officer that the "'main thing'" was that defendant "'wanted to get [Smith] off of [him].'" Defendant testified only that he thought Smith was about to do "physical body harm" to him and he felt he needed the knife for protection. These statements by defendant regarding what he believed at the time of the killing are not sufficient to meet the first element of imperfect self defense. *See State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) ("The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. *The defendant's own testimony, therefore, disproves the first element of self-defense*." (emphasis added)); *State v. Bush*, 307 N.C. 152, 156, 159, 297 S.E.2d 563, 566, 568 (1982) (holding — when defendant

testified he and victim were talking, victim "'all of a sudden . . . started pushing'" defendant, victim had no weapon and never struck defendant, defendant grabbed a knife "'because [he] was nervous and [he] thought [he] was protecting [him]self and [he] was afraid for [his] safety,'" and defendant "'stabbed the [victim] to get him off of'" defendant — that record was "void of any evidence tending to show that the defendant in fact believed it necessary to kill the deceased in order to save himself from *death* or *great bodily harm*").

Nor does the record contain any evidence that it was reasonable for defendant to believe that deadly force was needed to save himself from imminent death or great bodily harm. There was no evidence that Smith was in any way armed. In addition, although defendant hit Smith, Smith did not strike defendant, but rather just applied pressure to defendant, trying to force him to the ground. The evidence, therefore, did not warrant an instruction on voluntary manslaughter based on the theory of imperfect self defense. *See, e.g., id.* at 159, 297 S.E.2d at 568-69 (holding that circumstances were insufficient to create reasonable fear of death or great bodily harm when defendant's testimony indicated victim did not threaten to use weapon and did not attempt to strike defendant other than by placing his hands on defendant and pushing him); *State v. Wolfe*, 157 N.C. App. 22, 35, 577 S.E.2d 655, 664 ("[T]he evidence showed that [the victim] did not carry a gun, that no gun was found on or near him [at the time of the killing], and, amongst defendant's various versions of the incident, he never

claimed that he saw [the victim] with a gun. The evidence is insufficient to raise the issue of whether defendant *reasonably* believed he had to shoot [the victim] to protect himself from death or great bodily harm; therefore, the trial court did not err in denying the request for a self-defense instruction."), *appeal dismissed and disc. review denied*, 357 N.C. 255, 583 S.E.2d 289 (2003).

Defendant cites no authority in which our courts have held that an imperfect self-defense instruction was warranted when considering analogous facts. Although defendant relies extensively on *State v. Lowe*, 150 N.C. App. 682, 564 S.E.2d 313 (2002), and *State v. Bell*, 87 N.C. App. 626, 362 S.E.2d 288 (1987), neither case involved any question of self defense. Rather, the decisions simply stand for the unremarkable proposition that the trial court must instruct on a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury when a factual dispute exists as to whether the defendant used a deadly weapon during the assault. *See Lowe*, 150 N.C. App. at 686, 564 S.E.2d at 316 (jury could find that fists and commode lid were not used as deadly weapons but did inflict serious injury); *Bell*, 87 N.C. App. at 635, 362 S.E.2d at 293 (jury could disbelieve that weapon was involved at all or could believe that any shot fired was not result of defendant's use of weapon).

While defendant correctly cites these cases for the proposition that evidence must be viewed in the light most favorable to him, they do not alter the outcome of our analysis.

In contrast to *Lowe* and *Bell*, in this case, there was *no* evidence, as a matter of law, to support defendant's theory regarding the lesser offense of voluntary manslaughter. The trial court, therefore, did not err in refusing to give this instruction to the jury.

II

Defendant next contends that the trial court improperly coerced the jury to render its verdict. N.C. Gen. Stat. § 15A-1235 (2009) addresses the length of jury deliberations and deadlocked juries. N.C. Gen. Stat. § 15A-1235(c), in particular, provides: "If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in [§ 15A-1235](a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals."

Defendant specifically challenges the trial court's decision to allow the split jury to continue deliberations after the court had already discussed an overnight recess and declined to accommodate a juror's pre-scheduled plane flight for the next day. This juror had informed the prosecutors during *voir dire* on Monday, 10 November 2008 that she had an 11:00 a.m. flight on Friday, 14 November 2008. One of the prosecutors said to her, "[N]ow you told us that, so we're on notice. So if something happens, we take you, we're already on notice that you can't be here on Friday. So don't

let that concern you. You've done what you need to do." The juror was selected to sit on the jury.

The jury began deliberating at 11:29 a.m. on Thursday, 13 November 2008. With several breaks throughout the afternoon, the jury continued deliberating until 4:59 p.m. when they were called into the courtroom. Just before summoning the jury to the courtroom, the trial judge informed counsel for defendant and the State that he was inclined to recess for the day:

> THE COURT: Counsel, it's right at five, and for many, many years, I usually quit at 5:00, whether the jury is in or out.
>
> It would be my intention to bring them in and bring them back in the morning.
>
> What says the State?
>
> [THE STATE]: No objection.
>
> . . . .
>
> [DEFENSE COUNSEL]: Fine. Fine.

The jury then returned to the courtroom. The judge proceeded to ask the foreperson about the jury's status, and, after confirming that there was not yet a unanimous verdict, explained to the jury that deliberations would conclude for the day.

> THE COURT: Mr. Foreman, you have -- the jury has not reached a unanimous verdict.
>
> THE FOREPERSON: We have not, your Honor.
>
> THE COURT: Hand the verdict sheet to the bailiff.
>
> Ladies and gentlemen, we're going to take a nightly recess till 9:30 in the morning. Again, let me impress --

> [THE STATE]: Can we approach, Judge, real quick? Can I interrupt for a moment? I'm sorry. I didn't think about that until the jury came out.

At this point, the transcript indicates that an unrecorded bench conference occurred.

Afterwards, the judge addressed the foreperson again, inquiring about the current numerical split. The foreperson informed the judge that he was doubtful that, if the jurors were given some more time that evening, they could reach a decision, as one juror had already indicated that he or she wanted to take the night to "sleep on" what had been discussed in deliberations that day.

> THE COURT: Mr. Foreman, now don't blurt out anything, just wait till I tell you to answer.
>
> I'd like to know if there is a numerical split. Don't say anything. Eleven to one, ten to two, nine to three, seven to -- seven to five, six to six.
>
> First of all, yes or no, is there a numerical split, yes or no?
>
> THE FOREPERSON: Yes.
>
> THE COURT: And is the split eleven to one, ten to two, nine to three, eight to four, seven to five, six to six?
>
> THE FOREPERSON: I believe at this point we could say it is a ten to two.
>
> THE COURT: I think one of the jurors has a conflict for tomorrow. Of course, do you think Mr. Foreman by staying over a little bit that you could resolve that matter today?
>
> THE FOREPERSON: No, sir. One of the jurors would really like to have an opportunity to sleep on this tonight to

> consider all that we've discussed. And I -- I felt that really would be the best situation.

Upon learning that a unanimous decision was unlikely to be reached that evening, the judge announced that the jurors could be excused.

> [THE COURT:] . . . So do you feel like it would be in the best interest of the jury to take a recess or do you feel like that further deliberation for a few minutes today would help?
>
> THE FOREPERSON: Your Honor, I -- I would be glad to -- to stay over on this, but it is my honest belief that this particular juror really believes he needs time to -- to take all this information, weigh it out. And I have every reason to believe that he -- he legitimately needs this time. I do not think it would -- it would serve any purpose to stay over tonight.
>
> THE COURT: All right. We'll take a recess until 9:30 in the morning.
>
> And again, if one or two of you would walk out, you cannot discuss the case. You must wait until all 12 jurors come back in the morning to get together. And you're not to allow anyone else, including family members or friends to talk with you. Do not read anything in the newspaper.
>
> Keep all that in mind, and I will excuse you till 9:30 in the morning. When you come in in the morning, go to the jury room.
>
> Everyone else remain seated, the jurors are excused till in the morning.

The foreperson, however, interjected and reiterated that one of the jurors had a flight scheduled for the next day. After the judge indicated that the juror would have to miss the flight, the foreperson asked if the jurors could, after all, have a few minutes more to deliberate before recessing for the evening.

> THE FOREPERSON: This juror is catching a plane tomorrow.
>
> THE COURT: No. She won't be catching a plane tomorrow. I'm sorry, but the other -- if the other eleven agree to go back and try to dispose this case, I'll allow you to do that.
>
> [THE STATE]: Can we have a break, Judge? Before you release them or you've already made up your mind about that?
>
> THE COURT: I'm willing to let the jury decide what they want to do.
>
> THE FOREPERSON: Could we -- we have five minutes in the jury room to -- to discuss again the situation?
>
> THE COURT: All right. Keep in mind the instructions that I've just given you, and I'll let you go back to the jury room, and I'll give you ten minutes. And if you think you're making any progress or if you got a verdict, fine.
>
> If not, we'll take a recess till in the morning.

Fourteen minutes later, the jury returned a unanimous verdict of guilty of second degree murder.

Before considering the merits of defendant's argument, we must address whether the alleged error was preserved and what standard of review applies to this issue. Defendant acknowledges in his brief that he did not object to the trial court's instruction to the jury that they could continue deliberations on the evening of 13 November 2008 or to remarks about one juror's travel plans. Nonetheless, defendant argues that although the second sentence of N.C. Gen. Stat. § 15A-1235(c) is permissive, the first sentence is

mandatory, automatically preserving the coercion of a verdict issue for review.

In support of his position, defendant relies on *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). In *Ashe*, the Supreme Court recognized that a defendant's failure to object to alleged errors by the trial court generally operates to preclude raising the error on appeal. *Id.* The Court went on to state, though, that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *Id.*

In *State v. Aikens*, 342 N.C. 567, 578, 467 S.E.2d 99, 106 (1996) (internal citation omitted), however, the Supreme Court overruled a similar argument based on *Ashe*: "[T]he statute at issue, N.C.G.S. § 15A-1235(c), is permissive rather than mandatory. Hence, defendant having failed to object to the instruction, our review is to determine whether the error, if any, constituted plain error." In accordance with *Aikens*, we reject defendant's argument that the alleged error was preserved without objection, but, pursuant to his request, we review for plain error.

The plain error rule

> "is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to

> appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)). To find plain error, the error in a trial court's instructions to the jury must have been "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

Here, we need not address whether the trial court violated N.C. Gen. Stat. § 15A-1235(c) because, in any event, defendant has failed to demonstrate that any violation rose to the level of plain error. Significantly, the jury declined to find defendant guilty of first degree murder, but instead found defendant guilty of second degree murder. As a result, defendant, in order to establish the existence of plain error, must demonstrate that in the absence of the alleged error regarding deliberations, the jury would probably have found defendant not guilty.

Defendant, however, has never disputed that he stabbed Smith, and we have already held that the trial court properly declined to instruct on voluntary manslaughter. Given the evidence and the trial court's instructions, it is probable that the jury was debating between first degree and second degree murder.

The trial court instructed the jury that first degree murder is the unlawful killing of someone with malice and with premeditation and deliberation. The jury was also told that second degree murder is the unlawful killing of someone with malice but without premeditation and deliberation. After instructing as to the specific elements of first degree murder, the trial court then instructed the jury that it should find defendant guilty of second degree murder if it found beyond a reasonable doubt that "defendant unlawfully, intentionally and with malice wounded the victim with a deadly weapon, thereby proximately causing the victim's death." The trial court defined malice as meaning "not only hatred, ill will or spite, as it is ordinarily understood," but also "that 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."

In light of the overwhelming evidence that defendant admitted being mad, that defendant followed Smith into the bathroom, that defendant intentionally stabbed Smith multiple times, that defendant used a knife he had secretly brought into the club, and that the stabbing resulted in a substantial amount of blood being spread throughout the bathroom, we believe it highly improbable that the split within the jury was between a "not guilty" verdict and one of the potential murder verdicts. We cannot conclude, after reviewing the evidence and the instructions, that it was probable, in the absence of the claimed coercive instructions, that

the jury would have found defendant not guilty. Phrased differently, we do not believe that the trial court's instructions tilted the scales in favor of a verdict of guilty of second degree murder. Applying the plain error standard of review, it is more probable that defendant benefitted from the deliberations by receiving a second degree murder verdict rather than a first degree murder verdict.

Although defendant argues that *State v. Dexter*, 151 N.C. App. 430, 566 S.E.2d 493, *aff'd per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002), and *State v. Jones*, 292 N.C. 513, 234 S.E.2d 555 (1977), require the conclusion that the trial court's instructions were improperly coercive, those decisions do not lead to the conclusion that the instructions in this case, even if coercive, amount to plain error. Neither decision applied the plain error standard, and in *Jones*, 292 N.C. at 514, 234 S.E.2d at 555, the jury convicted the defendant of first degree murder (resulting in the death penalty), while in *Dexter*, 151 N.C. App. at 433, 566 S.E.2d at 495, the jury found the defendant guilty of the charged offenses. *Jones* and *Dexter* do not suggest that a new trial is warranted under circumstances such as those in this case. We, therefore, hold that defendant received a trial free of prejudicial error.

No error.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).