NO. COA12-5
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

STATE OF NORTH CAROLINA

v. Johnston County
No. 08CRS054280

LUIS ANGEL REYES HERNANDEZ,
Defendant.

Appeal by defendant from judgments entered on or about 28 February 2011 by Judge Franklin F. Lanier in Johnston County Superior Court. Heard in the Court of Appeals 16 August 2012.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Richard L. Harrison, for the State.

Mark Montgomery, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of first degree murder and robbery with a dangerous weapon. Defendant appeals and challenges jury instructions from his trial. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that in May of 2008, defendant, his mother, and his girlfriend decided they would rob

Mr. Bobby McLamb. Defendant's mother informed defendant "Bobby wasn't going to give up his money that easy; that he was going to have to kill him." Defendant's mother grabbed an aluminum bat. Once inside Mr. McLamb's home, defendant hit Mr. McLamb twice on the head with the bat. Mr. McLamb was then "laying on the floor . . . with blood by his head." Defendant's mother took money out of Mr. McLamb's pockets, informed defendant that Mr. McLamb's "eyes [were] still open[,]" and handed defendant a letter opener. Defendant then stabbed Mr. McLamb. Defendant, his mother, and his girlfriend took various items from Mr. McLamb's home when they left. Mr. McLamb died from "hemorrhaging from [the] stab wounds[.]"

On or about 5 August 2008, defendant was indicted for first degree murder ("murder") and robbery with a dangerous weapon ("robbery"). After a trial by jury, defendant was found guilty of both charges. Defendant was sentenced to life imprisonment without parole for his murder conviction and 64 to 86 months imprisonment for his robbery conviction. Defendant appeals.

II. Jury Instructions

Defendant contends that the trial court erred in its jury instructions. Generally, we review a jury instruction

> contextually and in its entirety. The charge will be held to be sufficient if it

> presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by the instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Hall, 187 N.C. App. 308, 316, 653 S.E.2d 200, 207 (2007) (ellipses and brackets omitted); *disc. review denied and appeal dismissed*, 362 N.C. 366, 663 S.E.2d 431 (2008).

A. *Mens Rea*

Before defendant's trial began, the trial court determined that defendant "suffer[ed] from mental retardation" but was "competent to stand trial." (Original in all caps.) According to defendant, "The trial court instructed according to the Pattern Jury Instructions on premeditation, deliberation and specific intent[;]" however, due in part to his mental capacity, defendant requested special jury instructions and summarizes them in his brief as follows:

> The trial court instructed the jury on specific intent:
>
> > Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must

> ordinarily [be] proved by circumstances from which it may be inferred. An intent to kill may be inferred on [sic] the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

. . . .

Counsel requested this additional language:

> The mere decision to commit an act does not satisfy the test for specific intent.

. . . .

The trial court instructed on premeditation:

> Fourth, that the defendant acted after premeditation, that is he formed the intent to kill the victim over some period of time, however, short, before he acted.

. . . .

Counsel requested this additional language:

> Premeditation involves the idea of prior consideration.

. . . .

The trial court instructed the jury on deliberation:

> And fifth, that the defendant acted with deliberation, which

> means that he acted while he was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly-aroused violent passion, it is immaterial that the defendant was in a state of passion or exited when the intent was carried into effect.

. . . .

Counsel requested this additional language:

> Deliberation means that the defendant "weighed the consequences of his actions and acted while in a cool state of mind or with a fixed purpose, and not as a result of a sudden impulse without the exercise of reasoning powers. . . [.] Deliberation indicates reflection, a weighing of consequences of the act in more or less calmness. . . [.] Deliberation refers to a steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences."

. . . .

The trial court instructed the jury on factors that might indicate premeditation and deliberation:

> Neither premeditation nor deliberation is usually susceptible of direct proof. They

> may be proved by proof of circumstances from which they may be inferred, such as the lack of provocation by the victim, conduct of the defendant before, during and after the killing, infliction of lethal wounds after the victim is felled, brutal or vicious circumstances of the killing, or the manner in which or means by which the killing was done.

. . . .

Counsel requested that the court also instruct the jury on factors that could show a lack of premeditation and deliberation, including the mental or emotional condition of the defendant. . . .

The court instructed the jury on [defendants'] lack of mental capacity:

> Now, you may find that there is evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case. If you find that the defendant lacked mental capacity, you should consider whether this condition affected the defendant's ability to form the specific intent which is required for conviction o[f] robbery with a dangerous weapon. If, as a result of lack of mental capacity, the defendant did not have the specific intent to commit robbery with a dangerous weapon, the defendant is not guilty of this offense.
>
> Therefore, I charge you however [sic], if upon considering the

evidence with respect to the defendant's lack of mental capacity you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of robbery with a dangerous weapon, you would not return a verdict of guilty of this offense.

You may find that there's evidence which tends to show the defendant lacked mental capacity at the time of the acts alleged in this case as it relates to first-degree murder. If you find that the defendant lacked mental capacity, you should consider whether this condition affected the defendant's ability to formulate the specific intent which is required for conviction of first-degree murder, you must find, beyond a reasonable doubt, that the defendant killed the deceased with malice and in the execution of an actual specific intent to kill formed after premeditation and deliberation. If, as the result of lack of mental capacity, the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, the defendant is not guilty of first-degree murder.

Therefore, I charge that upon consideration of the evidence with respect to the defendant's lack of mental capacity, you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of

> first-degree murder you will not return a verdict of guilty of first-degree murder.
>
> . . . .
>
> Counsel requested this additional language:
>
> > If the defendant did not have the mental capacity to deliberate, that is, to consider, reflect and weigh the consequences of any plan he may have formed, then under the law, he would not be capable of forming the specific intent [to kill][to commit robbery with a dangerous weapon].

Defendant states, "All of the defendant's requests for instructions were denied."

Defendant argues that "the trial court erred in not giving the defendant's special instructions on *mens rea*." (Original in all caps.) Defendant contends that "[b]ecause the instructions given were inadequate to instruct the jury on the true nature of premeditation, deliberation and specific intent, it was error for the trial court to have denied the defendant's requested instructions."

We first note that defendant is not arguing that the instructions provided by the trial court were incorrect but rather that they were "inadequate[.]" In other words, defendant contends that further instructions, his requested instructions,

should have been given, but not that any instruction provided was in error. We next note that defendant's brief fails to direct this Court's attention to a single case demonstrating that the trial court's instructions, without defendant's requested additions, were in error. As our Supreme Court has stated,

> A defendant may request a jury instruction in writing, and the trial court must so instruct provided the instruction is supported by the evidence. However, *a trial court is not obligated to give a defendant's exact written instruction so long as the instruction actually given delivers the substance of the request to the jury*. Also, . . . when instructions, viewed in their entirety, present the law fairly and accurately to the jury, the instructions will be upheld.

State v. Roache, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004) (emphasis added) (citations omitted); *see State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976) ("As we held in *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973), the trial court is not required to give a requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance. *State v. Howard*, 274 N.C. 186, 162 S.E.2d 495 (1968). Defendant requested instructions upon interested witnesses, impeachment of witnesses and expert

testimony. The trial court gave the requested instructions in substance. The portions of defendant's requested instructions which were not given were either not supported by the law in this jurisdiction or not supported by the facts in this case. Thus, we find no merit in this contention.")

Here, the trial court instructed the jury according to the pattern jury instructions. The portions of defendant's requested instructions which were not given were essentially restatements, in different words, of the same directives as included in the pattern instructions. The trial court is not required to give the portions of instructions that may favor the defendant twice. *See generally Roache*, 358 N.C. at 304, 595 S.E.2d at 420. As the trial court's instructions substantively stated that which defendant requested, albeit not in the exact words defendant requested, this argument is without merit. *See id.*

B. Reinstruction on Elements of Offenses

During jury deliberations, the jury foreman sent a note to the trial court stating,

> We respectfully request that the specific wording of the law with respect to first degree murder, second-degree murder, and robbery with a dangerous weapon be provided to us in written form, specifically the required elements that need to be proven

> beyond a reasonable doubt.

(Original in all caps.) Defendant requested that the trial court reinstruct the jury on the "elements along with the instructions on lack of capacity." The trial court denied both the jury's and defendant's requests. Defendant contends that "the trial court erred in not reinstructing the jury on the elements of the offenses." (Original in all caps.)

Our Supreme Court has stated,

> N.C. Gen. Stat. § 15A-1234 provides that the judge may give appropriate additional instructions to respond to an injury of the jury made in open court. We do not believe that the judge is required to repeat instructions which have been previously given to the jury in the absence of some error in the charge. We held in *State v. Dawson*, 278 N.C. 351, 365, 180 S.E.2d 140, 149 (1971) that needless repetition is undesirable and has been held erroneous on occasion.

State v. Hockett, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983) (quotation marks omitted). Defendant attempts to liken his case to *Hockett*, where the Supreme Court ordered a new trial because "the failure of the trial court to answer the questions of the jury on an important point of law was prejudicial error[.]" *Id.* at 802, 309 S.E.2d at 253. However, in *Hockett*, the jury asked a specific legal question, "Is the threat of harm or force with a deadly weapon the same as actually having or using a weapon?"

Id. at 800, 309 S.E.2d at 252. The Supreme Court noted,

> It is obvious that the jury had some question as to whether the State had proved beyond a reasonable doubt that the perpetrator of this offense was armed with a dangerous or deadly weapon, and thus, they were inquiring as to the effect of such a finding upon their determination of guilt on the various offenses charged.

Id. at 801, 309 S.E.2d at 253.

Here, unlike in *Hockett*, the jury did not inquire about a specific question of law but rather requested all of the elements of the applicable offenses. As defendant's own argument states, the jury requested a "reinstructi[on]" not a clarification. As such, we conclude the trial court did not abuse its discretion in denying the requests for a reinstruction on the elements of the crime. *See Hockett*, 309 N.C. 800-02, 309 S.E.2d at 252-53; *State v. Bartow*, 77 N.C. App. 103, 110, 334 S.E.2d 480, 484 (1985) (determining there was no abuse of discretion where trial court "refus[ed] to give the reinstructions requested"). This argument is overruled.

C. Acting in Concert

The trial court instructed the jury on acting in concert stating,

> 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 robbery with a dangerous weapon and/or first-degree murder, each of them, if actually or constructively present, is guilty of that crime even if only one of them actually commits the crime. Each of them is also guilty of any other crime committed by others in pursuance of the common purpose to commit robbery with a dangerous weapon and/or first-degree murder, or as a natural or probable consequence thereof.

Defendant contends that "the trial court erred in instructing the jury on acting in concert." (Original in all caps.)

"Our Court reviews a trial court's decisions regarding jury instructions *de novo*. . . . A trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Jenkins*, 202 N.C. App. 291, 296-97, 688 S.E.2d 101, 105 (citation, quotation marks, and brackets omitted), *disc. review denied*, 364 N.C. 245, 698 S.E.2d 665 (2010).

> 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) (citation and quotation marks omitted).

The State's evidence tended to show that defendant, his mother, and his girlfriend decided they would rob Mr. McLamb; defendant was aware he would have to kill Mr. McLamb in order to rob him; defendant's mother brought a bat to Mr. McLamb's; defendant hit Mr. McLamb with the bat and eventually killed him; and defendant, his mother, and his girlfriend took property from Mr. McLamb. Certainly, such evidence supports an instruction on acting in concert. *See id.* This argument is overruled.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).