NO. COA12-61
NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

STATE OF NORTH CAROLINA

v. Guilford County
No. 11 CRS 24376

MICHAEL WADE NIDIFFER

Appeal by defendant from judgment entered 17 June 2011 and amended 25 July 2011 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 16 August 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Tina A. Krasner, for the State.

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

McCULLOUGH, Judge.

Michael Wade Nidiffer ("defendant") appeals from his conviction of voluntary manslaughter in the death of Alan Dale Atkinson ("victim"). We find no error.

I. Background

On 19 April 2010, defendant was indicted by a Guilford County Grand Jury for second-degree murder in the death of victim. The case came on for jury trial during the 14 June 2011 Criminal Session of Guilford County Superior Court, the Honorable Richard L. Doughton presiding.

Evidence presented at trial tended to show that defendant and victim met each other approximately one year before the incident giving rise to this case and that defendant moved into victim's apartment soon thereafter. During the time that victim and defendant shared the apartment, two of victim's children, born out of victim's ten-year relationship with Susan Pavlov ("Pavlov"), would occasionally visit with victim at the apartment.

On 3 February 2010, after victim's children had spent a long weekend with victim, Pavlov attempted to contact victim to inform him that she needed to pick up the children. Because defendant and victim shared defendant's cell phone while they were living together, Pavlov called defendant's cell phone. After several unanswered phone calls throughout the day, defendant answered his cell phone around 10:00 p.m.

During their conversation, defendant informed Pavlov that on 1 February 2010, a few days prior, he and victim had a

disagreement over defendant's disciplining of victim's son. As a result of their disagreement, defendant left the apartment. Pavlov testified that defendant sounded angry during their conversation and that defendant repeatedly told her to get the kids. Pavlov also testified that defendant told her that he would not fight victim, but "if it came down to that, he'd take care of business and he'd be leaving in a box."

Following her conversation with defendant, Pavlov drove to the apartment to pick up the children. While Pavlov was there, defendant entered the apartment and went straight to his bedroom. Defendant emerged from his bedroom shortly thereafter with a black duffle bag. As defendant was leaving, victim asked defendant to let him get some things out of defendant's truck. Defendant refused and told victim that he would have to wait until tomorrow to get his things. Defendant and victim began to argue.

Pavlov testified that she took the children outside when the argument ensued. However, once outside, Pavlov heard what she described as people wrestling around inside. Pavlov reentered the apartment, whereupon she saw victim standing in front of defendant, who was crouched down on the floor. Pavlov testified that she got between victim and defendant, at which

point she saw defendant reach behind his back and then hit victim in the hip with his open hand. Victim responded to defendant saying, "Oh, you're trying to stab me, you got a knife." However, Pavlov testified that she did not see a knife in defendant's possession.

Victim then retreated to the kitchen and picked up a baseball bat. As the situation escalated, Pavlov called the police.

Pavlov testified that while on the phone with the police, she realized that she did not know the house number. Therefore, Pavlov stepped outside to find it. When Pavlov returned, she saw victim up against his bedroom doorframe and defendant standing in front of victim with his arm raised. Pavlov testified that she did not see defendant stab victim, but saw defendant pull the knife from defendant's chest. Pavlov also testified that she did not know who attacked who first.

Defendant's testimony told a slightly different story than Pavlov's testimony but was largely corroborative. Defendant testified that when he refused to allow victim to get his belongings out of the truck, victim brought up the disagreement from several days earlier. Victim then charged at defendant and knocked him to the ground. Defendant stated that victim had him

pinned and was pounding on his head. Pavlov separated the two, at which point victim picked up a baseball bat. Defendant stated that he did not have a knife at this point. But, when victim walked toward him with the bat, defendant retreated to his bedroom and grabbed the knife from his dresser drawer. Defendant testified that when victim came at him with the bat, he steadied himself, stepped forward, and stuck out the knife.

After being stabbed, victim stumbled outside where he fell to the ground. Defendant followed victim outside, placed the knife on top of his truck, and attempted to aid victim until help arrived.

A police investigation found blood in the hallway of the apartment and on the apartment's bathroom floor. The sheath for the knife was found in a dresser drawer in defendant's bedroom. The baseball bat was found in the hallway and the knife was recovered from the top of defendant's truck. An autopsy of victim revealed the cause of death to be two stab wounds to victim's chest. One wound penetrated approximately three inches into victim's chest and the second wound penetrated approximately one inch into victim's chest.

After the presentation of evidence and arguments, the jury was instructed on second-degree murder and voluntary

manslaughter. No further instructions were requested and no objections to the instructions were made. On 17 June 2011, the jury returned a guilty verdict for voluntary manslaughter. The trial judge entered the judgment and sentenced defendant to prison for a term of 65 to 87 months. Defendant appeals.

II. Analysis

Defendant's sole contention on appeal is that the trial court erred by failing to instruct the jury on the lesser included offense of involuntary manslaughter. We disagree.

The record in this case reveals that the trial judge reviewed the proposed jury instructions with both parties before they were provided to the jury. In his review, the trial judge specifically stated that he would instruct the jury on second-degree murder and voluntary manslaughter and leave out involuntary manslaughter. Neither party objected. Additionally, the trial judge inquired whether either party requested additional instructions. Both the State and defendant responded, "No, your honor." Because defendant failed to object to the instructions provided to the jury and failed to request an additional instruction on involuntary manslaughter, "we review the omission of this instruction under the plain error

standard." *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002).

Our Supreme Court adopted the federal rule for plain error review in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In summary,

> "[t]he plain error rule 'allows review of fundamental errors or defects in jury instructions affecting substantial rights, which were not brought to the attention of the trial court.' In order to obtain relief under this doctrine, defendant must establish that the omission was error, and that, in light of the record as a whole, the error had a probable impact on the verdict."

Lowe, 150 N.C. App. at 685, 564 S.E.2d at 315 (quoting *State v. Bell*, 87 N.C. App. 626, 634-35, 362 S.E.2d 288, 293 (1987) (citation omitted)). Thus, "[a] reversal for plain error is only appropriate in the most exceptional cases." *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005). A review of the record in the present case reveals that this is not one of those "exceptional cases" where plain error mandates a new trial.

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). However, "[i]f the State's evidence is sufficient to fully satisfy its burden of proving each element of the

greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *State v. Smith*, 351 N.C. 251, 267-68, 524 S.E.2d 28, 40 (2000) (citation omitted).

Here, the jury was instructed on second-degree murder and voluntary manslaughter. After weighing the evidence, the jury convicted defendant of voluntary manslaughter. "Generally voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force under the circumstances is employed or where the defendant is the aggressor bringing on the affray." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978).

In the present case, the State's evidence was sufficient to prove each element of voluntary manslaughter. Thus, the question we must address is whether evidence was presented to negate the elements of voluntary manslaughter and allow a jury to rationally find defendant guilty of involuntary manslaughter.

Our Supreme Court has explicitly stated that "[i]nvoluntary manslaughter is a lesser included offense of second degree murder and voluntary manslaughter." *State v. Thomas*, 325 N.C.

583, 591, 386 S.E.2d 555, 559 (1989) (citing *State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985)). "The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997).

Here, defendant does not dispute that he stabbed victim. Instead, defendant claims that sufficient evidence was presented for the jury to find that the stabbing was unintentional and a result of culpable negligence. Culpable negligence has been defined as "'such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.'" *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933)).

The evidence in this case does not negate the element of intent required for voluntary manslaughter and lead to a finding of culpable negligence. First, defendant testified that when victim was coming at him with the bat, "I just took the blade out in my hand and said, no. I stepped forward. I always got to

use my right back foot, my back balancing foot. I stepped forward, stuck the knife out." Second, defendant stated that he was defending himself. Third, the autopsy report revealed that victim suffered from two stab wounds to his chest. One stab wound penetrated approximately three inches into victim's chest and the second stab wound penetrated approximately one inch into victim's chest. This evidence does not support a conclusion that defendant was reckless or careless.

The only evidence tending to negate the finding of voluntary manslaughter is defendant's own testimony that he did not intend to stab victim. However, defendant's denial that he committed the offense is not sufficient in and of itself to compel an instruction on a lesser included offense. *See Smith*, 351 N.C. at 267-68, 524 S.E.2d at 40.

III. Conclusion

Where the State presented sufficient evidence to prove voluntary manslaughter and where the only evidence tending to negate a finding of voluntary manslaughter was defendant's denial that he intended to harm victim, the trial court did not plainly err in excluding a jury instruction on the lesser included offense of involuntary manslaughter.

No error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).