NO. COA13-121
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 09CRS259691

RONALD TOLSON,
Defendant.

Appeal by defendant from judgment entered 26 June 2012 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 29 August 2013.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General David N. Kirkman, for the State.

District 26 Public Defender Kevin P. Tulley, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

STROUD, Judge.

Ronald Tolson ("defendant") appeals from the judgment entered 26 June 2012 after a jury found him guilty of second degree murder.

I. Background

Defendant was indicted on 4 January 2010 for murder in the first degree of Markus Foster. The case went to jury trial in

Mecklenburg County. At trial, the State's evidence tended to show the following:

On the afternoon of 11 December 2009, Mr. Foster was with several friends at the apartment he shared with Danny and Kelly Bethea. Mr. Foster and defendant were cousins, both living in the Charlotte area. Mr. Foster believed that defendant looked down on him and wanted to teach defendant a lesson. When defendant came over to Mr. Foster's apartment that afternoon, Mr. Foster hid behind the front door and hit defendant over the head with a beer bottle when he came into the apartment, knocking him to the floor. While defendant was on the floor, Mr. Foster took his cash and ordered him to leave.

Later that evening, Mr. Foster, the Bethea brothers, and several friends went to a nearby strip club called "Crazy Horse." While Mr. Foster and his friends went to the club, defendant returned to Mr. Foster's apartment to look for the money that had been taken from him, ransacked the apartment, then left.

Around 1 or 2 a.m. the following morning, Mr. Foster was "acting out" outside the Crazy Horse, yelling that defendant had driven by and attempted to shoot him, but the gun had jammed. Mr. Foster and his friends then drove back to Mr. Foster's

apartment. When they arrived at the parking lot to Mr. Foster's apartment complex, they got out of the car and saw defendant standing in front of the building with a gun in his hand. Mr. Foster and defendant were yelling and walking toward each other, getting ready to fight. Defendant then fired one shot and Mr. Foster began backing away. As Mr. Foster was backing away, defendant fired another shot. After this second shot, Mr. Foster turned and ran, and defendant fired a third shot. As Mr. Foster was running away, he said something to the effect of "I've been hit." Defendant briefly chased Mr. Foster, then went back to his car and drove away.

Everyone scattered after the shooting, but soon the Bethea brothers began looking for Mr. Foster. Danny Bethea called 911 and told the operator that his "brother" had been shot. He also described the green car that defendant had been driving. Kelly Bethea eventually found Mr. Foster lying on the ground behind a nearby store.

When the police arrived on scene, they saw Mr. Foster lying on the ground in a large pool of blood. They also discovered a trail of blood leading from the apartment complex and recovered two 9mm shell casings from the scene. Mr. Foster was pronounced dead at the hospital. The forensic pathologist who examined Mr.

Foster found two bullet entry wounds in Mr. Foster's lower body, one of them fatal.

Eventually, the Bethea brothers and Mr. Foster's friends explained what happened to the police. Defendant was later arrested without incident. The State also introduced evidence that defendant and his brother attempted to bribe Danny Bethea in an unsuccessful effort to convince him not to testify.

After the State rested its case-in-chief, defendant introduced evidence to support his version of the events of that night. Based on defendant's own testimony and that of Donte Hill, a friend of defendant's brother, the robbery and shooting occurred as part of one transaction. According to defendant, when he got to Mr. Foster's apartment around 1 a.m., someone opened the door and hit him over the head with a hard object. Defendant then saw Mr. Foster point a gun at him. In response, defendant reached toward the gun and they began struggling for control. In the midst of that struggle, one shot went off, then defendant managed to gain control and fire one more shot while one of Mr. Foster's hands was still on the gun. Defendant then managed to fully wrest control of the gun from Mr. Foster, backed up, and fired a third shot toward Mr. Foster's lower

body. Defendant claimed that in shooting toward Mr. Foster's lower body, he did not mean to kill him, only scare him.

After all evidence was presented, the trial court instructed the jury on first degree murder, second degree murder, voluntary manslaughter, and self-defense. Defendant initially requested that the trial court only instruct the jury on first-degree murder or not guilty, but then agreed with the State that the proposed instructions were proper. Defendant never objected to the trial court's instructions.

The jury returned a verdict of guilty as to second degree murder. The trial court sentenced defendant to 180 to 225 months confinement. Defendant gave oral notice of appeal. The trial court entered a corrected judgment amending the terms of defendant's potential supervised release on 26 June 2012.

II. Instruction on Involuntary Manslaughter

Defendant argues that the trial court committed plain error in not instructing the jury on the lesser included offense of involuntary manslaughter and that he received ineffective assistance of counsel when his trial attorney failed to request such an instruction. Because the evidence did not support an involuntary manslaughter instruction, even taken in the light most favorable to defendant, we hold that the trial court did

not err in omitting an instruction on involuntary manslaughter and that defendant did not receive ineffective assistance of counsel.

"A trial court must submit to the jury a lesser included offense when and only when there is evidence from which the jury could find that the defendant committed the lesser included offense." *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988). However, "[w]here the . . . evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations and quotation marks omitted).

If it is not error to omit an unsupported instruction, it is obviously not plain error to do so.[1] Further, if defendant was

[1] Even if it were error, defendant has waived appellate review by inviting the error. Defendant specifically requested instructions only as to first degree murder or not guilty, then agreed with the State that the instructions as proposed by the trial court were proper. A defendant is not entitled to review of error invited by his own conduct, even plain error review. *State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993) (holding that any error in a trial court's failure to instruct on a lesser-included offense was invited error when the defendant unambiguously indicated that he wanted the trial court only to instruct the jury on first-degree murder or not guilty); *State v. Goodwin*, 190 N.C. App. 570, 574, 661 S.E.2d 46, 49 (2008) ("[A] defendant who invites error has waived his right to

not entitled to the instruction, it cannot be ineffective assistance of counsel for the trial attorney to not request it. *See State v. Seagroves*, 78 N.C. App. 49, 54, 336 S.E.2d 684, 688 (1985), *disc. rev. denied*, 316 N.C. 384, 342 S.E.2d 905 (1986).

The jury here was instructed on first degree murder, second degree murder, and voluntary manslaughter on the theories of heat of passion and imperfect self-defense. Defendant's theory at trial was that he shot Mr. Foster to defend himself. Defendant now argues that the evidence could support a charge of involuntary manslaughter because his shooting at Mr. Foster was an act constituting culpable negligence when he did not mean to kill Mr. Foster.

"[I]nvoluntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Hill*, 311 N.C. 465, 471, 319 S.E.2d 163, 167 (1984). Defendant contends that because he did not intend to kill Mr. Foster, the jury should have been instructed on involuntary manslaughter, presumably because he believes this fact would negate the intent element of second degree murder.

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all appellate review concerning the invited error, including plain error review." (citation and quotation marks omitted)).

> Neither second degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase "intentional killing" refers not to the presence of a specific intent to kill, but rather to the fact that the *act* which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act of assault committed under circumstances sufficient to show malice is second degree murder. Such an act of assault committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense, is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm.

State v. Ray, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980) (citations omitted).

"The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions" that "(1) the killing was unlawful; and (2) that it was done with malice." *State v. Wrenn*, 279 N.C. 676, 682-83, 185 S.E.2d 129, 133 (1971). Where there is "no evidence of an unintentional discharge of the weapon" there is no evidence to support a charge of involuntary manslaughter. *Hill*, 311 N.C. at

471-72, 319 S.E.2d at 168; *see Wrenn*, 269 N.C. at 682, 185 S.E.2d at 133.

Here, the evidence, even taken in the light most favorable to defendant, did not support an involuntary manslaughter instruction. The evidence from both the State and defendant showed an intentional shooting.[2] Defendant claimed that he shot at Mr. Foster because he was scared, but that he did not mean to kill him. Defendant testified: "I don't know by the grace of God I gained control of the gun, I just aimed down and shoot, pow. We separate, I fire again and he take off running." Although defendant described the precise sequence of the three shots differently at several points in his testimony, each time he admitted gaining control of the gun and intentionally firing two shots.

There was no evidence that he "mishandled" the firearm or that he believed the gun was unloaded. *Cf. State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978) ("[O]rdinarily an unintentional homicide resulting from the reckless use of firearms in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is

[2] Defendant does not dispute that the 9mm pistol he used to shoot Mr. Foster was a deadly weapon that he used as such.

involuntary manslaughter." (citation, quotation marks, and emphasis omitted)); *State v. Wallace*, 309 N.C. 141, 145-46, 305 S.E.2d 548, 551 (1983) (holding that the defendant was entitled to an instruction on involuntary manslaughter when he testified that the gun discharged, killing his girlfriend, when he tossed the loaded and cocked gun across the room).

Defendant cites *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985), to support his argument. In *Lane*, we held that "the testimony of the defendant . . . that he pointed a pistol toward Mr. Oden which fired when he tried to pull it back and that he fired the second shot in an effort to scare Mr. Oden away from him is evidence of culpable negligence." *Lane*, 77 N.C. App. at 744, 336 S.E.2d at 412. In *Lane*, we were only considering whether the evidence supported a conviction of involuntary manslaughter, not considering whether that evidence would have entitled the defendant to an instruction on involuntary manslaughter. Moreover, in that case, the defendant had testified at that "he did not intend to fire the second shot and he was not sure whether he pulled the trigger or the gun discharged when Mr. Oden twisted his arm." *Id.* at 743, 336 S.E.2d at 411. Thus, *Lane* is distinguishable from the present case.

Here, by contrast, even defendant's evidence shows that he intentionally discharged a firearm at Mr. Foster. Evidence that defendant aimed at Mr. Foster's legs and did not intend to kill Mr. Foster does not entitle defendant to an instruction on involuntary manslaughter. In deciding whether the evidence supported an instruction on involuntary manslaughter, the question is not whether defendant intended to kill Mr. Foster, but whether he intended to fire the shot that proximately caused Mr. Foster's death. *See Ray*, 299 N.C. at 158, 261 S.E.2d at 794; *Wilkerson*, 295 N.C. at 579, 247 S.E.2d at 916. Defendant has never contended that he fired the lethal shot unintentionally.

"Where the . . . evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772. Because the evidence, taken in the light most favorable to defendant, shows that he "intentionally fired the shot that killed" Mr. Foster, he was not entitled to an instruction on involuntary manslaughter. *State v. Young*, 196 N.C. App. 691, 698, 675 S.E.2d 704, 709 (2009). Therefore, the trial court did not err by omitting an instruction on involuntary manslaughter

and defendant did not receive ineffective assistance of counsel when his trial attorney elected not to request such an instruction.

III. Referring to Decedent as "The Victim"

Defendant next argues that the trial court committed plain error by referring to Mr. Foster as the "victim" repeatedly during its instructions to the jury, citing a variety of cases from other states, and contends that in doing so it expressed an opinion on the evidence, in violation of N.C. Gen. Stat. § 15A-1232. Yet, as he acknowledges, a long line of controlling authority in this state holds that use of the term "victim" in instructing the jury is not normally prejudicial error, let alone plain error.[3] It seems particularly improbable that use of

[3] *See, e.g.*, *State v. McCarroll*, 336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994) (addressing the defendant's argument that when the trial court called the complaining witness "the victim" it was expressing an opinion on the evidence and holding that the trial court's references to "the victim" did not constitute plain error), *State v. Allen*, 92 N.C. App. 168, 171, 374 S.E.2d 119, 121 (1988) (holding that it was not prejudicial error for the trial court to refer to the complaining witness as "the victim"), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989), *State v. Hatfield*, 128 N.C. App. 294, 299, 495 S.E.2d 163, 165-66 (holding that it was not plain error for the trial court to refer to the complaining witness as "the victim" fifteen times), *disc. rev. denied*, 348 N.C. 75, 505 S.E.2d 881, *cert. denied*, 525 U.S. 887, 142 L.Ed. 2d 165 (1998), *and State v. Henderson*, 155 N.C. App. 719, 723, 574 S.E.2d 700, 703 (holding that the use of the term "victim" was not prejudicial error and noting that "it is clear from case law that the use of the term

the term "victim" here—even twenty-four times—would sway the jury when it was uncontested that defendant shot and killed Mr. Foster. Defendant simply contended that he did so in self-defense. Therefore, this argument is unavailing.

IV. Conclusion

It was not error for the trial court to omit an instruction on involuntary manslaughter and defendant did not receive ineffective assistance of counsel when his trial attorney did not request that instruction because the evidence did not support such an instruction. Additionally, the trial court did not commit plain error in referring to the decedent as "the victim."

NO ERROR; NO PLAIN ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).

'victim' in reference to prosecuting witnesses does not constitute plain error when used in instructions."), ***app. dismissed and disc. rev. denied***, 357 N.C. 64, 579 S.E.2d 569 (2003).